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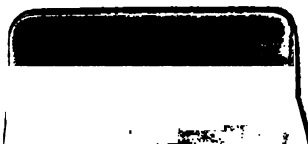
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S.H. 1827.

TREATISE
ON THE
EXPOSITION OF WILLS
OF
LANDED PROPERTY.

By JAMES RAM, Esq.,

OF THE INNER TEMPLE, BARRISTER AT LAW.



LONDON:

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P R E F A C E.

THE following Treatise has been prepared to exhibit, in a small compass and practical form, one of the most important branches of the law of real property—the law on the Exposition of Wills. As few owners of any description of landed property die intestate ; and as, in consequence, few titles to estates are found without a will in them ; the law on the exposition of devises is, necessarily, a subject of universal interest and daily investigation. The Author has aimed to compile a book to be useful in the interpretation of wills of common occurrence. To this end, he has selected for his materials, exclusively the authorities, and principles of construction, of frequent practical application. It has formed a part of his plan, in the exposition of many of the cases, to transcribe the

language of the Bench, as their best explanation; and he has sought farther to increase the usefulness of the work, with little addition to the length of it, by the many references which will be found dispersedly made to the margin, for numerous cases of similar import with those mentioned in the text. The latest authorities have, when practicable, been preferred for illustration: a few which have been published during the progress of the work in the press are added at the end.

10, Crown Office Row, Temple.

21st April, 1827.

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ERRATA.

PAGE 4, For 27 *Hen. VIII.*, read 32 *Hen. VIII.*
270, line 11, for *come* read *comes*.

A
TREATISE
ON
THE EXPOSITION OF WILLS
OF
LANDED PROPERTY.

CHAPTER I.

INTENTION, THE LAW OF DEVISES.

THE cases on the subject appear to authorize the general position, that the *intention* of the testator is the law of devises.

In a *deed*, technical form and language are often essential to give effect to the intention of the parties, on the principle, that a deed is made with mature deliberation, and with knowledge of the laws (*a*).

A greater latitude of construction is permitted of wills, on the principle, that a testator is not supposed (*b*) to be acquainted with legal form and language (*c*); and that it is a reasonable indulgence, to leave to every one the power to make his own will in his own way.

(*a*) 1 P. W. 20. 2 Bl. C. 381. (c) 2 Bl. C. 381. 1 P. W. 20.

(*b*) 2 Atk. 580. Willes, 213.

The exposition of wills has always been governed by the intention of the testator. Before the Statute of Wills, 32 Hen. VIII., c. 1, this was a part of the common law (*a*).

Since the Statute of Wills, the same principle has been invariably acknowledged. The early (*b*) cases all notice it; and many of the most learned of the Judges, in later times, have insisted on this principle in pointed and remarkable language. Mr. Justice *Wilmot* has said, "the principle that must govern all cases of this kind, is the intention of the testator, which is the Pole-star for the direction of devises" (*c*). Lord Chief Justice *Willes*: "The rule is, that *voluntas testatoris totum est*" (*d*). Lord *Kenyon*, also: "I am clearly of opinion, that the intention of the testator is the Polar-star, by which we should be guided in the construction of wills" (*e*). And Lord *Loughborough*: "It is my duty to give effect to the will, as far as the intention can be clearly made out. It is not permitted to me to be affectedly ignorant of the intention; much less to control a certain established intention upon my own idea of the fitness or unfitness, the liberality, or the political tendency of it" (*f*).

- | | |
|--|---|
| (<i>a</i>) Litt. S. 586. Bro. Abr. | (<i>c</i>) 2 Burr. 1112. See, also, 1 |
| <i>Devise</i> 1, 29, 38, 39, 52. 6 Mod. | Madd. Rep. 439. |
| 110. 1 Salk. 237. 1 P. W. 20. | (<i>d</i>) 1 Atk. 377. |
| (<i>b</i>) 2 Dyer, 122 a (20), 171 a | (<i>e</i>) 2 East, 42. |
| (7); 3 Dyer, 261 b (27). Lingen's | (<i>f</i>) 4 Ves. 341. See, also, <i>ibid</i> , |
| case, <i>ib</i> . 323 a. Clache's case, <i>ib</i> . 330. | 312, 329, 574; 2 Vern. 337. |



CHAPTER II.

OF ILLEGAL DEVISES.

SECTION I.

Of Prospective Devises of after-purchased Lands.

IN the position, that the intention of the testator is the law of devises, the intention meant is, an intention of the testator *legally* (a) to dispose of his property. This is the intention which the law will, if possible, fulfil. An intention, illegally to dispose of it, the law will frustrate. It should seem, a person cannot do more by his will than, with legal advice, he is able to do by a conveyance in his lifetime. He may, indeed, effect any given object *in a different way*, by his will; but the rules of law, which govern the *objects* themselves of a settlement of real property, are as applicable to a will as to a deed; and if an object is illegal, a will can not attain it.

A will of lands, held for a freehold estate, is considered to be a species of *conveyance*. It will not, therefore, operate on lands in which the testator has no interest when he makes his will (b). “Although,” observes Lord *Mansfield*, “as to personal estate, the law of England has adopted the rules of the Roman testament, yet a devise of lands in England is considered in a different light from a

(a) 2 Burr. 1112. 1 Atk. 377. (b) Cowp. 90. 2 Bl. C. 378.
2 East, 42.

Roman will. For a will, in the civil law, was an institution of the heir. But a devise in England is an appointment of particular lands to a particular devisee, and is considered in the nature of a conveyance by way of appointment; and upon that principle it is, that no man can devise lands which he has not at the date of such conveyance. It does not turn upon the construction of the statute 27 Hen. VIII., which says, that ‘any person *having* lands, &c., may devise;’ for the same rule held before the statute, where lands were devisable by custom (*a*). It may, then, perhaps, be said to be *illegal*, prospectively to devise lands of inheritance, which the testator may agree to purchase after the making of his will; or prospectively to devise a freehold lease, which is not the property of the testator when his will is made; or, if the testator has a subsisting freehold lease, prospectively to devise a renewed (*b*) lease of the same lands. Terms of years, it may be added, are *personal* property, and the principle mentioned does not extend to them. It is in the power, therefore, of a testator, if he pleases, to devise (or bequeath) a lease for *years*, which he is not possessed of at the time he makes his will. As the devise is legal, it will be carried into effect (*c*).”

SECTION II.

Of Devises in Perpetuity.

A SETTLEMENT in *perpetuity*, (which is any period longer than the time the law permits land to be unalienable), is illegal, and cannot be effected by any assurance

(*a*) Cowp. 90.

(*b*) See 6 Madd. Rep. 84.

(*c*) 11 Ves. 390. *Colegrave v. Manby*, 6 Madd. Rep. 72.

whatever. The object of the law against settlements in perpetuity is, to facilitate the change of landed property from one hand to another (a). A means to this end is, to prevent its being tied up, beyond a reasonable period, in the hands of persons unable to sell, or otherwise dispose of the whole estate in it: if the estate be in fee, then of the fee-simple; if for years, of the term. The law permits land to be made unalienable for a period, from the day the land is settled, of a life, or any number of lives, then in being (b), and 21 years, and the farther period of nine months, or any additional time, within which a posthumous child must, if at all, be born (c). Any longer period is, in law, a perpetuity.

The point, from which the law begins to count a perpetuity, is, it is apprehended, the day on which the property is settled. A will of lands seems to be a settlement made on the day of the testator's death; and from that day, it should seem, a perpetuity is, therefore, to be reckoned. But it appears, so strict and cautious is the law not to permit a perpetuity, that it is not sufficient if, in event, at the death of the testator, it turns out that the estate is alienable within the prescribed time; but the will, and not accident, must make it so: and if a limitation in a will is too remote when the will is published, the limitation is then, in its creation, void, and accident is not permitted to make it afterwards legal (d).

It does not appear that the law against a perpetuity requires, that, within the limited time, the whole estate, in fee or for years, is to be vested in one person, and that he, singly, without the concurrence of other persons, is to have the right to alien it. It seems only to require that

(a) 1 Eden, R. 416. 11 Ves.
137.

(b) *Ibid*, 134, 136.

(c) 7 T. R. 102, 103.

(d) *Lady Lanesborough v. Fox,*
Forrester, 262.

the estate in fee, or the term, shall then be alienable; but whether by one person singly, or by many, as by a particular tenant and remainder-men, seems to be immaterial. The law against a perpetuity appears not to be infringed on, if, within the limited period, there are persons in existence who are entitled, in the case of a fee simple, to alien the whole fee, and, in the case of a term of years, to alien the whole term. Consistently with the law against a perpetuity, a person seised in fee may legally devise to *A.*, a person living, for life, remainder to *A.*'s first son unborn in tail; or to *A.* for life, remainder to *A.*'s first son unborn for life (*a*), remainder to *B.*, a person living, in tail or in fee; or to *A.* for 500 years, in trust to pay the testator's debts and legacies (*b*), remainder to *B.*, a person living, for life, remainder to *B.*'s first son unborn, for life, remainder to *C.*, a person living, in tail or in fee. In neither of these instances, is a perpetuity created. In each, the fee simple is alienable within the prescribed period. In the first, by *A.* and *A.*'s first son, on his attaining 21; in the second, by *A.*, *A.*'s first son at 21, and *B.*; in the third, by *A.*, *B.*, *B.*'s first son at 21, and *C.*

It may, in this place, be observed, that a tenant *per auter vie* is incapable, by the nature of his estate, of creating a perpetuity. His own estate being only for the lives of persons in being, an estate of longer continuance cannot be created out of it (*c*).

In whatever way a testator may attempt to create a perpetuity; whether

1, By devising successive estates for life to persons unborn; or

(*a*) *Hay v. Earl of Coventry*, 3 T. R. 83.

(*c*) *Low v. Burron*, 3 P. W. 262.

(*b*) *Gore v. Gore*, 2 P. W. 28.

2, By depriving a tenant in tail of his power to suffer a common recovery ; or

3, By limiting an executory devise, which is not to take effect within the period prescribed by law ; or

4, By means of a power ; or

5, By a devise on trusts which would make the estate unalienable longer than the law permits—the intention of the testator cannot be carried into effect.

1. A person devised his lands “ to the *Drapers’ Company* and their successors, in trust to convey the premises to his godson, *Matthew Humberston*, for life, and afterwards, upon the death of the said *Matthew*, to his first son for life, and so to the first son of that first son for life, &c. ; and if no issue male of the first son, then to the second son of the said *Matthew Humberston* for life, and so to his first son, &c. ; and in failure of such issue of *Matthew*, then to another *Matthew Humberston* for life, and to his first son for life, &c., with remainders over to other persons for their lives successively, and their respective sons, when born, for their lives ; without giving an estate tail to any of them, or making any disposition of the fee”(a). As this case is reported in *Vernon*, the Court, in giving judgment, said, “ an attempt to make a perpetual succession of estates for life is vain, and not practicable ; however, there ought to be a strict settlement made, and the intent of the testator followed, as far as the rules of law will admit of ;” and it directed, “ the settlement to be made, so that such who were in being, should be only tenants for life ; but where the limitation was to be to a son not in being, there he must be made tenant in tail male (b).” The words of the decree were, “ that the Master do see a settlement made,

(a) *Humberston v. Humberston*, 1 P. W. 332. 2 Vern. 737. See 1 Eden, 422

(b) 1 Vern. 738. See 1 Eden, 422.

of the residue of the trust estate, pursuant to the will of the testator, with limitations to the several parties named to be tenants for life in the said will, and to the heirs male of their bodies, in strict settlement, according to the course of law ; and if any of the parties who are named tenants for life have any issue male living, their names are to be inserted in the deed of settlement (a).” In *Thellusson v. Woodford*, Lord *Alvanley* noticed an inaccuracy in this decree. He said, “ instead of the words, ‘ to the heirs male of their bodies in strict settlement, according to the course of law,’ it ought to have been to the first and other sons, and the heirs male of their bodies successively. It is doubtful, whether the decree meant, that all the persons named, who were in existence at the time the decree was pronounced, should be made tenants for life. I cannot think that was the meaning. It must have meant all the persons named, who were in existence at the time of the testator’s death ; for it cannot be contended, that the children born after the testator’s death, should, by the accident of being born before the decree, have estates for life given to them (b).”

Lewis Southcomb, being seised in fee in remainder, devised in these words : “ to him the said *Thomas*, I do give my estate of *Holcomb Burnel*, during his natural life, as soon as it shall fall ; but to his trustee in his behalf shall be committed the profits of the said estate, until he shall arrive at the age of 21 years ; and after him I do give it to his eldest or any other son after him, during his natural life ; and after them to as many of his descendants issue male, as shall be heirs of his or their bodies, down to the tenth generation during their natural lives.” Lord *Ellenborough*, who delivered the judgment of the court in this

(a) 1 Eden, 422.

(b) 4 Ves. 333. 1 Eden, 423 (a).

case, distinguishing it from *Robinson v. Robinson*, and the other cases determined on the same principle, observed, "in all these cases, expressions were used, denoting an intention that the lands should continue in the descendants of the first taker, as long as there were any, without specifying or marking what estates such descendants should take. But, in this case, the deviser has not used general terms, from whence an intent to give a descendible estate to the issue of the first devisee may be collected; but has, in express terms, narrowed the estates which the issue were to take to estates for life; and this, properly speaking, is not a case of a particular and a general intent, both of which cannot be effectuated, and where the one must give way to the other; but a case of single intent, to create a succession of estates for life, not warranted by any law (a)."

Cannon Southey devised "to *Hugh Somerville* and *H. F. Luttrell* in fee, in trust to and for the use of his great nephew, *J. S. Somerville*, for the term of ninety-nine years, if he should so long live, and after that term to the use of the first, second, third, and fourth sons of the said *J. S. S.*, and the issue male of their bodies lawfully begotten, for the like term of ninety-nine years, as they should be in seniority of birth; and in default of such issue male in him or them, then to the use of his kinsman *John Southey*, and the issue male of his body lawfully begotten, for the like term of 99 years; and in default of issue male of him, then to his brother *Robert Southey*, and the issue male of him for the like term; and in default of issue male of him, to the devisor's right heirs." A question on this will having been sent out of Chancery for the opinion of the court of King's Bench, the following certificate was returned: "We are of opinion, that *Hugh Somerville* and

(a) *Seaward v. Willock*, 5 East, 198.

Henry Fownes Luttrell, took a fee-simple in the freehold and copyhold estates, according to their respective natures, and the absolute interest in the leasehold estates, devised to them by the will of the testator, *Cannon Southey*; subject however to the trusts of the said will; and that none of the subsequent limitations are limitations of uses executed by the statute. If the subsequent limitations had been limitations of uses executed by the statute, we are of opinion, that *John Southey Somerville* would have taken an estate for a term of 99 years, determinable with his life, in the freehold and copyhold estates of the testator, and in his leasehold estates, if they should so long continue; and that upon his death, his first son would take a like estate for a term of 99 years, determinable with his life, in the freehold and copyhold estates, and in the remainders of the leasehold estates; and that the several subsequent limitations to the second, third, and fourth sons of the said *John Southey Somerville*, and the limitations to the defendant *John Southey*, and his issue male, and the limitations to *Robert* and *Thomas Southey*, and their issue male, would be void; and that the other sons of the plaintiff, *John Southey Somerville*, would not take any estate under the testator's will (a)."

A person devised an estate, consisting of freehold and leasehold lands, "to his grandson *John James Beard*, and his assigns, so that he and they might receive and take the rents, issues, and profits thereof, to his and their use, during the term of 99 years, if he should so long live; and, immediately after his decease, then to the first son of his body, lawfully to be begotten, and his assigns, to receive and take the yearly rents thereof, to his and their own use, for the like term of 99 years, if he should happen so long

(a) *Somerville v. Lethbridge*, 6 T. R. 213.

to live; and so on in tail male to such first son lawfully issuing for ever. And for want, and in default of such issue of such first son, then to the use and behoof of the second, and all and every other son and sons of *John James Beard*, severally, successively, and in remainder, one after another, as they should be in seniority of age, and priority of birth, and the issue male of such son or sons, lawfully issuing, for the like term of 99 years only (in case he should so long live); and that such elder son, or the issue of such elder son, should have no greater estate than for the term of 99 years, determinable at his decease; and the elder son of such issue male always to take place before the younger of such son and sons, and the issue male of his and their bodies lawfully issuing. And in case there should be no issue male of the said *John James Beard*, nor issue of such issue male at the time of his death, or in case there should be such issue male at that time, and they should all die before they should respectively attain 21, without lawful issue male; then, there were similar limitations over to *Joseph Beard* (the brother of *John James Beard*), and his sons and issue male." A case on this will was referred by the court of Chancery to the Judges of the King's Bench, who returned a certificate in these words: "This case has been argued before us, and we are of opinion, that *John James Beard*, the grandson and heir at law of *John James* the testator, took, under the said testator's will, an estate for 99 years, determinable with his life, in the freehold estates devised to him, in the first instance; and also in the leasehold estates devised, if they should so long continue; and that, upon his death, leaving one or more sons, his first son will take an estate for 99 years, determinable with his life, in the freehold estates, and what shall then remain of the terms for which the leasehold estates are held. We are also of

opinion, that all the limitations subsequent and expectant upon the limitation to the first son of *John James Beard* are void "(a).

2. In *Sonday's* case, *Merrick Sonday* devised a house to *Margaret* his wife, for life, "and, after her decease, my son *William* to have it, and if my son *William* marry, and have by his wife any male issue lawfully begotten of his body, then his son to have it; if he have no male issue lawfully begotten of his body, than my son *Samuel* to have the house;" and *totidem verbis*, to his son *Thomas*; then this clause is added:—"and my will and mind is, that if any of my sons, or their heirs male issue of their bodies, go about at any time to alienate or mortgage the house, that then the next heir to enter upon the house and enjoy it." A common recovery was afterwards suffered by *Thomas*, who became seised in possession; and the question arose, if, by this means, he had forfeited his estate. It was resolved by the Court, "that no condition or limitation, be it by act executed, or by limitation of a use, or by devise in a last will, can bar tenant in tail from aliening by a common recovery" (b).

This case has been followed (c) by *Mary Portington's* case (d), *Foy v. Hynde* (e), *The Pewterer's Company v. Christ's Hospital* (f); and *The King v. Burchell* (g). In the last, Lord *Northington* said, "The only remaining question is, whether a man can give an estate tail, and, by annexing a proviso conditional not to alien, charge the estate upon alienation of tenant in tail, with such sum of money as he thinks proper? And I can no more think of

(a) *Beard v. Westcott*, 5 B. & 4 M. & S. 362.

A. 801. Turn. R. 25.

(d) 10 Co. 35 b.

(b) 9 Co. 128.

(e) Cro. Jac. 697.

(c) See, also, *Mainwaring v. Baxter*, 5 Ves. 458.

(f) 1 Vern. 161.

Roe v. Bedford

(g) 1 Eden, 424; Amb. 379

saying any thing upon that question, than if it were made one, whether, if a person should purchase an estate in fee-simple, it would be descendible to heirs female?" (a)

3. If a person is seised in possession (b), and by his will he limits an *executory devise* in fee, the devise is not valid, unless the estate in fee is limited to become vested in the object of the devise within the period of a life or lives in being and 21 years, and the further period of nine months, or any other time, within which a posthumous child must, if at all, be born (c). If the law were otherwise, a perpetuity might effectually be created; for an executory devise cannot be barred by any means whatever, not even by a common recovery (d).

The law against a perpetuity applies also to executory devises by a termor for years. If a person has an estate for years in possession, and devises it, the devise is not valid, unless the term is limited to become vested in the object of the devise in a period less than the legal perpetuity (e). As an executory devise of a term of years cannot be barred (f), there is as much danger of a perpetuity, and consequently as much reason to limit the time within which it must take effect, as on a devise of an estate of inheritance.

4. The first Duke of *Marlborough* attempted to create a perpetuity, by means of a *power* in his will. He devised to trustees, "To the use of *Harriet*, Countess *Godolphin*, for life; remainder to *William*, Lord *Ryalton*, son and heir apparent of the Earl and Countess *Godolphin*, for life; remainder to his first and other sons in tail male;

(a) 1 Eden, 434.

(b) See *Badger v. Lloyd*, 1 Ld. Raym. 523, 525.

(c) *Lady Lanesborough v. Fox*, Cas. temp. Talb. 262. 7 T. R. 102.

(d) *Pells v. Brown*, Cro. Jac.

590. 2 Bos. & P. 327. 2 P. W. 55.

(e) *Love v. Windham*, 1 Lev. 290. 1 Mod. 50, 114.

(f) 8 Co. 96. 10 Co. 47 b, 52. 1 Leo. 93.

remainder to all other the sons of *Harriet*, Countess *Godolphin*, successively in tail male ; remainder to *Robert*, Lord *Spencer*, for life ; remainder to his first and other sons in tail male ; with several remainders over." And the following clause was added:—" And I do hereby empower and direct my trustees, on the birth of each and every son hereafter to be born of the said Lord *Ryaltton*, and also of the said *Harriet*, Countess *Godolphin*, and also of the said Lord *Spencer*, and also of, &c., by deed to revoke and make void the respective uses limited to their respective sons in tail male ; and in lieu thereof to limit the premises to the use of such sons for their lives, with immediate remainders to the respective sons of such sons, severally and respectively in tail male, according to the seniority of the said sons." This will became the subject of a suit in Chancery ; and the Lord Keeper *Northington*, after many observations on the nature and impolicy of settlements in perpetuity, decreed, "that the clause of revocation and re-settlement in the will of the Duke of *Marlborough*, is tending to a perpetuity, and, as repugnant to the estates limited, is void and of none effect" (a).

A person devised "all his manors, &c., at *Stanstead*, in the county of *Essex* (subject to certain annuities, &c.), to his sons respectively for life, successively, with remainder to the first and other sons of such sons successively in tail male, with divers remainders over ; and he thereby declared, that notwithstanding he had before limited the succession of his estate to his several sons according to their seniority, yet it was his will, and he thereby directed, that it should be lawful for each of them, as they should be respectively seised in possession, by will duly executed, to alter and change the course of succession aforesaid ; and on failure of issue of his own

(a) Duke of Marlborough v. Earl Godolphin, 1 Eden, 404.

body, to appoint the next immediate remainder or succession of the premises to any other of the testator's sons, without regard to seniority, and that such son so appointed, should take the next immediate estate for life, with remainder over to support contingent uses, and to his first and other sons in tail male, as therein before limited to testator's eldest son, and his first and other sons. And the testator directed, that every of his sons, so to be appointed, should, when in actual possession of the premises, have the same power of appointing by his will the succession or next remainder, in default of issue male of his own body, to any other of testator's sons for life, and to his issue male, in manner aforesaid, so long as the testator should have more than one son living." On a bill brought to carry the trusts of the will into execution, Lord *Northington* directed, "That the trusts of the will and codicils should be performed and carried into execution, except so far as they relate to the alteration of estates-tail into tenancies for life, which is void by law" (a).

5. Mr. *Thellusson* devised to trustees on the following long trust of accumulation :—

"Upon trust that they the said *Matthew Woodford*, *James Stanley*, and *Emperor John Alexander Woodford*, and the survivors and survivor of them, and the heirs and assigns of such survivor, do and shall from time to time during the natural lives of my sons *Peter Isaac Thellusson*, *George Woodford Thellusson*, and *Charles Thellusson*, and of my grandson *John Thellusson*, son of my said son *Peter Isaac Thellusson*, and of such other sons as my said son *Peter Isaac Thellusson* now has or may have, and of such issue as my said grandson *John Thellusson* may have, and of such issue as any other sons of my said son *Peter Isaac*

(a) *Heath v. Heath*, 2 Eden, 330.

Thellusson may have, and of such sons as my said sons *George Woodford Thellusson* and *Charles Thellusson* may have, and of such issue as such sons may have, as shall be living at the time of my decease or born in due time afterwards; and during the natural lives and life of the survivors and survivor of the several persons aforesaid; collect and receive the rents and profits of the manors or lordships, messuages, lands, tenements, and hereditaments hereinbefore by me devised and so to be purchased as aforesaid."

The trustees are then directed, on the death of the survivor of the several persons during whose lives the accumulation is to go on, to divide all the estates devised to, and to be purchased by, the trustees, into three parts, and to convey one part in tail male to the eldest male lineal descendant of each of his three sons.

The trusts in this will were for *accumulation*, and being considered not to infringe on the law against a perpetuity, they were established (a). But there is an inference from this case, that if an estate is devised in fee, or by a termor for years, on *any* trusts which *do* infringe on that law, the devise will be illegal, and consequently, cannot be carried into effect.

SECTION III.

Of a Fee. on a Fee.

It is not legal to devise a fee on a fee; as to A., and his heirs, and on the determination of that estate, to B. and his heirs (b). In *Tilbury v. Barbut*, a person devised to his wife for life, and after her death, to his son *John* and

(a) *Thellusson v. Woodford*, 4 1 Salk. 238. *Grumble v. Jones*,
Ves. 227. 11 Ves. 112. 11 Mod. 207. *Preston v. Funnell*,

(b) *Tilbury v. Barbut*, 3 Atk. Willes, 164.
617. 1 Ves. 89. *Aumble v. Jones*,

his heirs for ever ; and in case of the death of *John* without any heir, then his real and personal estate, devised to his son *John*, to go and be enjoyed by his son *Cornelius*. Lord *Hardwicke*, in giving judgment in this case, said, " In all devises of this kind, where there is a fee mounted on a fee, I dare say the testators mean heirs of the body ; but unless there are words to restrain it to an estate-tail, I am bound to construe it a fee in the first taker ; and, consequently, as the testator has devised the whole to *John*, the second devise is void in law. I cannot go on a presumption that the testator did not know the law. If testators do not use proper words, the Court will supply them, where the intention of the testator is consistent with the rules of law ; but where there is a fee mounted on a fee, it is a void devise in law" (a).

SECTION IV.

Of a Devise to an Heir at Law.

IF a person devises to his heir at law, he cannot make him take by *purchase*, if he devises to him the *same estate* in the land, as, supposing the will not made, the heir would take by *descent*. To make an heir at law a purchaser, the ancestor must devise to him an estate which would not descend to him ; as, supposing the testator to be seised in fee, an estate for years, for life, or in tail (b). Under either limitation, the heir will take by purchase. Likewise in the case of co-heiresses, if the ancestor devises to them in joint-tenancy, they will take by purchase, for by descent they would be co-parceners (c). So, if he devises to one co-heiress only, this one will take by pur-

(a) 3 Atk. 617.

(c) Anonymous, Cro. Eliz. 431.

(b) 2 Bl. C. 241, 242. 1 Salk. Beare's case, 1 Leo. 112. 3 Lev. 233. See *Welby v. Welby*, 2 Ves. 127. and B. 187.

chase (a). In *Scott v. Scott*, the testator devised "to *Henry*, his eldest son, and to his heirs and assigns; nevertheless, in case he should die without issue, not having attained 21, then, from and immediately after his death, under age and without issue, to the testator's son *William*, and the heirs male of his body," with remainders over. The eldest son attained 21; and the Lord Keeper *Henley* determined, that the eldest son took by devise, as having under the will a different estate than would have descended to him, the one being pure and absolute, the other not (b). To cause an heir at law to take by purchase, the *estate* which comes to him must, in some way, be altered by the devise; and therefore an heir will take by descent, although the devise to him is charged with the payment of a sum of money, or the debts of the testator (c); for, in these cases, the *estate* devised is not varied.

The distinction between *purchase* and *descent* is important in its consequences to third persons. On this principle it seems to be, and in their favour, whenever a person devises to his heir at law the same estate he would otherwise have by descent, the law avoids the devise, notwithstanding any intention of the testator to the contrary, and makes the estate descend on the heir. Before the statute 3 Wm. & Mary, c. 14, it appears, in particular, to have been important to creditors, that an heir should take by descent, and not under a devise to him; but this statute (which is made perpetual by the 6 & 7 Wm. III., c. 14) makes devises void as against creditors. "The difference in effect," says Sir *William Blackstone*, "between the acquisition of an estate by descent and by purchase, consists principally in these two points:—1. That, by purchase, the estate acquires a

(a) *Reading v. Royston*, 1 Salk.

242. 2 Ld. Raym. 829.

(b) Amb. 383.

(c) *Haynworth v. Pretty*, Cro.

Eliz. 833, 919. *Hedger v. Rowe*,

3 Lev. 127.

new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor. For when a man takes an estate by purchase, he takes it not *ut feudum paternum*, or *maternum*, which would descend only to the heirs by the father's or mother's side; but he takes it *ut feudum antiquum*, as a feud of indefinite antiquity, whereby it becomes inheritable to his heirs general, first of the paternal, then of the maternal line. 2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will. For if the ancestor, by any deed, obligation, covenant, or the like, bindeth himself and his heirs, and dieth; this deed, obligation, or covenant, shall be binding upon the heir, so far forth only as he (or any other in trust for him) had any estate of inheritance vested in him by descent from (or any estate *pur auter vie* coming to him by special occupancy, as heir to) that ancestor, sufficient to answer the charge; whether he remains in possession, or hath alienated it before action brought; which sufficient estate is in the law called *assets*, from the French word *assez*, enough. Therefore if a man covenants, for himself and his heirs, to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he has an estate sufficient for this purpose, or assets, by descent, from the covenantor; for though the covenant descends to the heir, whether he inherits any estate or no, it lies dormant, and is not compulsory, until he has assets by descent" (a).

SECTION V.

Of an intention to change the course of descent.

IT is not in the power of a testator to make an estate descend contrary to the legal course of descent. On a descent,

(a) 2 Bl. C. 243.

heirs on the father's side take precedence of heirs on the mother's side; and the intention of a testator cannot control this rule. If he devises to *A.* and his heirs on the part of his mother; at *A.*'s death, his heirs on his father's side will be entitled to the estate, notwithstanding the testator intended it should descend to his maternal heirs (*a*). A testator may devise to *A.*, and make *B.*, the person who is the heir at law of *A.* on his mother's side, a *purchaser*; and, by this means, limiting the estate to *B.* and his heirs, he may effect his intention to make the estate descendible from *B.* in the line of the heirs of *A.* on his mother's side. But in this case it is plain he cannot be said to make the estate descend contrary to the legal course of descent. The land does not *descend* from *A.* to *B.* He makes *B.* a *purchaser*, and from him the estate will descend to his heirs according to law. It is legal to leave an estate to the family of the mother of *A.*; but then it is necessary to devise it to the maternal heir as a *purchaser*: an intention to make him take by *descent* is illegal, and cannot be effected.

SECTION VI.

Of a Devise of a Term of Years to Real Representatives.

A TERM of years is not a subject of *descent*, and a testator cannot make it so (*b*). The legal nature of it is, to devolve to the *personal* representatives of the owner, and not to his heirs (*c*). If a term is devised to *A.* and his heirs, at *A.*'s death it will belong to his executors; and no intention of the testator to the contrary can make the term *descend* to the *real* representative of *A.* (*d*). A testator may, indeed, if he adopts a proper legal mode for the purpose, settle a

(*a*) Co. Litt. 13 a. Watk. Desc. 148.

(*d*) 1 P. W. 433. Davis v. Gibbs, 3 P. W. 26. 2 Atk. 580.

(*b*) 3 P. W. 31. 2 Atk. 580.

Co. Litt. 46 b.

(*c*) Co. Litt. 319 b.

term of years in a way that real representatives may have the benefit of the term after the death of their ancestor; but then they will not take their interest in the term by *descent*. A term of years may be devised to *A.* for life, and, after the death of *A.*, to *B.*, who is the heir at law of *A.*; and the latter limitation (which will not be a remainder, for a *remainder* cannot be limited out of a term of years) (*a*) as an executory devise, will be valid (*b*). So, likewise, *A.*, possessed of a term, may devise it to *B.* for life, and after his death, to *B.*'s eldest son, unborn at the testator's death, for life; and this, also, will be a good *executory devise* (*c*).

SECTION VII.

Of a Devise of a Term of Years in Tail.

As a term of years cannot be made to descend on real representatives, it follows it cannot be *entailed*. If *A.*, possessed of a term, devises it to *B.* and the heirs of his body, this devise will be equivalent to a limitation to *A.* alone, or to *A.* and his executors. *A.*, in his life time, may dispose of it as he pleases; and at his death, if undisposed of, it will belong to his personal representatives. The intention of the testator cannot make it descend to the issue of *A.* (*d*). It has been said, that a term of years cannot be entailed, "for this plain reason, that no recovery can be suffered" (*e*). The true reason seems to be, because the term cannot be made to descend on real representatives. An estate *pur autre vie* may be entailed (*f*), and the entail may be barred without a common recovery (*g*).

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| (a) 8 Co. 95. | 2 Ves. jun. 536. 1 T. R. 596. |
| (b) Manning's case, 8 Co. 95. | Kinch v. Ward, 2 Sim. and St. |
| Lampet's case, 10 Co. 47. | 409. |
| (c) Cotton v. Heath, 1 Eq. Abr. | (e) 2 Ves. jun. 539. |
| 191, pl. 2. | (f) 2 Vern. 185. |
| (d) Harg. Co. Litt. 20 a (5). | (g) 6 T. R. 292, 293. |
| Fearne, 461. Fordyce v. Ford, | |

SECTION VIII.

Mortmain.

THE Statute of *Mortmain*, also called *de Religiosis*, 7 Ed. I., s. 2, c. 1, makes it illegal to devise in mortmain; that is, to any corporation, lay or ecclesiastical, sole or aggregate (a). It enacts, "that no person, religious or other (b), whatsoever he be, presume to buy, or under the colour of gift or lease, or by reason of any other title, whatsoever it be, to receive of any man, or by any other craft or engine, to appropriate to himself any lands or tenements, under pain of forfeiture of the same, whereby such lands and tenements may anywise come into mortmain (c)."

Under this statute, it appears illegal to devise to any corporation either in fee, *per auter vie*, or for years; or to devise to a corporation a lease *per auter vie*, or for years.

The Statutes of Wills, 32 Hen. VIII., c. 1, and 34 and 35 Hen. VIII., c. 5, authorise devises, excepting in mortmain. The words of the statutes are, "except to bodies politic and corporate."

The 7 and 8 Wm. III., c. 37, it should be added, empowers the crown "to grant to any person or persons, bodies politic or corporate, their heirs and successors, license to alien in mortmain; and also to purchase, acquire, take, and hold, in mortmain, in perpetuity or otherwise, any lands, tenements, rents, or hereditaments whatsoever, of whomsoever the same shall be holden (d)."

SECTION IX.

Charitable Uses.

THE stat. 9 Geo. II., c. 36, makes it illegal to devise

(a) Co. Litt. 2 b.

in 1 vol. "Statutes of the Realm."

(b) See *ibid.*

(d) See Harg. Co. Litt. 99 a

(c) See the Statute and notes (1).

lands to *charitable uses*. It enacts, that "from and after the 24th day of June, 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned or appointed, or any ways conveyed or settled, to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever; unless such gift, conveyance, appointment, or settlement, of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate (other than stocks in the public funds), be and be made by deed indented, sealed and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor, (including the days of the execution and death) and be inrolled in his Majesty's High Court of Chancery, within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks, six calendar months at least before the death of such donor or grantor, (including the days of the transfer and death); and unless the same be made to take effect in possession, for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him.

"Provided always, that nothing hereinbefore mentioned

relating to the sealing and delivering of any deed or deeds, twelve calendar months at least before the death of the grantor, or to the transfer of any stock six calendar months before the death of the grantor or person making such transfer, shall extend, or be construed to extend, to any purchase of any estate or interest in lands, tenements, and hereditaments, or any transfer of any stock, to be made really and *bonâ fide*, for a full and valuable consideration, actually paid at or before the making such conveyance or transfer, without fraud or collusion.

“ And be it further enacted, that all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall at any time, from and after the said 24th day of June, 1736, be made in any other manner or form, than by this act is directed and appointed, shall be absolutely and to all intents and purposes null and void.

“ Provided always, that this act shall not extend or be construed to extend, to make void the dispositions of any lands, tenements, or hereditaments, or of any personal estate, to be laid out in the purchase of any lands, tenements, or hereditaments, which shall be made in any other manner or form than by this act is directed, to or in trust for either of the two Universities within that part of Great Britain called England ; or any of the colleges or houses of learning within either of the said Universities ; or

to or in trust for the colleges of Eton, Winchester, or Westminster, or any or either of them, for the better support and maintenance of the scholars only upon the foundations of the said colleges of Eton, Winchester, and Westminster."

This statute is often, but erroneously, called the Statute of *Mortmain*. The Statute of Mortmain is the 7 Edw. I., st. 2, c. 1, also called *de Religiosis*. The act of Geo. II. is not, in any sense, a mortmain act. It neither prohibits nor authorises alienation in mortmain; in other words, to a *corporation*. By the common law, it was legal to *devise to individuals* to charitable uses. The statute of Geo. II. makes such devises illegal. This was its object; it declares void any alienation to charitable uses, if not made by *deed* (a).

The statute includes devises for charitable purposes, by means of a *trust for sale* (b). In the *Attorney General v. Lord Weymouth*, in which there was a trust for sale, it was said by Lord *Hardwicke*: "If Sir *John James*, instead of devising the surplus, had said, I charge my real estate with the payment of 1000*l.* to a charity, it would certainly have been void by the express words of this act. And will it not then be absurd to say, he shall be able to give his whole real estate to be turned into money for the benefit of a charity? (c)." In the *Attorney General v. Tyndall*, a person devised "all her freehold and leasehold estates to trustees, upon trust to sell and dispose of the same; and out of the monies arising by such sale, part to be laid out in the purchase of a competent piece of ground for erecting and building an alms-house, in the parish of St. *James*, in the city of *Bristol*, and the

(a) See 4 Ves. 427, 428. 1 Jac. General v. Tyndall, 2 Eden, 207. Rep. 183. Amb. 614.

(b) Attorney General v. Lord Weymouth, Amb. 20. (c) Amb. 25. Attorney

other part to be laid out in the building, erecting, and furnishing the said alms-house; the residue of her estate to be laid out in the purchase of lands in the names of trustees, in trust, out of the rents and profits, to pay certain weekly stipends to twenty poor persons whom she had before appointed to live in the said alms-house." On an appeal from the *Master of the Rolls*, it was determined that this devise could not be carried into effect (a). The devise of the leaseholds being void, they fell into the residue; and the decree at the Rolls declared, that although the devise of the residue could not be supported to purchase a scite for the alms-house, yet that it might to build the alms-house, if ground were given to the trustees for the purpose. This part of the decree was founded on the authority of the *Attorney General v. Bowles* (b), in which Lord *Hardwicke* had determined, that the word 'erect' did not necessarily import a direction to purchase land, and that if the trustees could get a piece of ground by the gift or generosity of any person, not by purchase, they might build on the land so acquired, notwithstanding the statute. Lord *Northington*, by reversing the decree at the Rolls, overruled that interpretation of the word 'erect.' In the *Attorney General v. Parsons*, Lord *Eldon* observed; "I agree with the late cases, which go a great way to establish, that the Court cannot put such a construction upon the word 'erect,' as was put upon that word in former cases; and that, *primâ facie*, the testator must be taken to mean by that word, that land shall be bought. I think the good sense is with the later cases, requiring that the testator himself should manifest his purpose to be sufficiently answered, if the trustees could hire or beg land, according to the expressions in the different cases" (c).

(a) 2 Eden, 207. Amb. 614.

(c) 8 Ves. 191. See also 9 Ves.

(b) 2 Ves. 547. See also Vaughan 544. 2 Eden, 215.

v. Farrer, *ibid.* 182.

The statute extends also to devises subject to a *charge* for charitable purposes (a). In *Arnold v. Chapman*, there was a devise of a copyhold estate to one *Chapman*, he causing to be paid to the testator's executors 1000*l.*; and, after payment of debts and legacies, the residue and remainder of all the testator's real and personal estate were bequeathed to the governors of the Foundling Hospital, and their successors, for ever. "Had the testator," said Lord *Hardwicke*, "devised the copyhold estate on condition to pay 1000*l.* to the governors, it would have been void by the statute. He has taken another method, by including it in a residuary bequest of real and personal estate: and it is said that they can take, because, by giving it to the executors, he has made it part of the personal estate; and he may, undoubtedly, if he pleases, turn it into personal estate; but it must be for lawful purposes. But here the act intervenes; which, if this was allowed, would be easily evaded; for it would be only directing the real estate to be sold, and the money to be given to the charity: and in the case of *James* (b), this was determined to amount to a devise of the land itself; because all charges, trusts, sums of money, &c., devised out of land to a charity, are made void by the act (c)."

Devises *in trust to convey to charitable uses* are also within the statute (d).

The statute farther includes devises for any *public purpose permanently beneficial*, although in strictness, perhaps, it cannot be called a *charity* (e). In *Jones v. Wil-*

(a) *Arnold v. Chapman*, 1 Ves.

108. *Jackson v. Hurlock*, 2 Eden,
263. Amb. 487. *Wright v. Row*,
1 Bro. C. C. 61.

(b) *Attorney General v. Lord*
Weymouth, Amb. 20.

(c) 1 Ves. 110.

(d) *Edwards v. Pike*, 1 Eden,
267. *Doe v. Aldridge*, 4 T. R.
264. *Doe v. Wrighte*, 2 B. & A.

710.

(e) *Jones v. Williams*, Amb.

liams, there was a bequest of 1000*l.*, to arise by sale of the testator's real estate, "for the purpose of bringing spring water from *St. Arvans*, or elsewhere, to the town of *Chepstow*, for the use of the inhabitants, for ever;" and it was decided that this devise was within the statute of charitable uses, and therefore void (*a*).

SECTION X.

Of the Statute of Accumulation.

THE will of Mr. *Thellusson* occasioned the Statute of Accumulation, 39 and 40 Geo. III., c. 98. It recites: "Whereas it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained;" and enacts: "That no person or persons shall, after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise soever, settle or dispose of any real or personal property, so and in such manner, that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors; or the term of 21 years from the death of any such grantor, settlor, deviser, or testator; or during the minority or respective minorities of any person or persons who shall be living, or in *ventre sa mère*, at the time of the death of such grantor, deviser, or testator; or during the minority, or respective minorities only of any person or persons who, under the uses or trusts of the deed, sur-

651. *Howse v. Chapman*, 4 Ves. the word "charity," *Morice v.*
 542. *Townley v. Bedwell*, 6 Ves. *Bishop of Durham*, 10 Ves. 522.
 194. *Doe v. Aldridge*, 4 T. R. 1 Jac. Rep. 184.
 264. See also, on the extent of (*a*) *Amb.* 651.

render, will, or other assurances directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce, so directed to be accumulated : and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property, so directed to be accumulated, shall, so long as the same shall be directed to be accumulated, contrary to the provisions of this act, go to, and be received by, such person or persons as would have been entitled thereto, if such accumulation had not been directed.

“ Provided always: That nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons; or to any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise; or to any direction touching the produce of timber or wood upon any lands or tenements; but that all such provisions and directions shall and may be made and given as if this act had not passed.”

On this statute it has been determined, on a devise of an estate to be sold, the money to arise from the sale to be invested in the public funds, with this proviso;— “ That so much of the dividends, or interest, as shall accrue due to *Elizabeth Mary Griffiths*, during the life of *John Griffiths*, her husband, shall not, during that time, be paid to her, or to any person for her use, but the same shall be, during his life, invested by the trustees in the public funds, on government or real securities; and that the dividends, or interest, which shall accrue thereon, shall be added to, and accumulated with, the capital; and, on

the decease of the said *John Griffiths*, the said capital, with the accumulations thereof, shall be forthwith transferred, or paid, to *Elizabeth Mary Griffiths*;" that, on the true construction of the act, "the accumulation directed during the life of the husband, if not in fact going beyond 21 years, was good; and if it did in fact continue beyond that period, yet, on the true construction of the act, the direction was good, *pro tanto*; and during the period of 21 years the rents and profits are well directed to accumulate; leaving it to the law to determine what is to become of the rents and profits to accrue between the end of the 21 years and the expiration of the life; and, of course, to determine, also, what is to become of the interest of the fund created by the accumulation permitted for the period of 21 years (a)." On a bequest in these words: "To my niece, *Mary Ann Williams*, the sum of 5000*l.*, during life; after which to her children, for their education and maintenance, and to be equally divided among them, on their arriving at the age of 21 years;" it was determined, the accumulation was void only for the excess, and good for 21 years, although the legatee, in this case, was not born at the death of the testator. The *Master of the Rolls*, Sir *William Grant*, observed: "Suppose, instead of a life, with regard to which there might be some uncertainty, the testator had said, the accumulation should continue 24 years; it would be good for 21 years, within that determination. [*Griffiths v. Vere*]." The decree accordingly directed the accumulation for 21 years from the death of the testator (b).

(a) *Griffiths v. Vere*, 9 Ves. 127, 131.

(b) *Longdon v. Simson*, 12 Ves. 295.

CHAPTER III.

OF THE MEANS TO COLLECT THE INTENTION.

THE means, at law and in equity (*a*), to collect the testator's intention, are *the words of the will*, free of *conjecture* (*b*).

It has been forcibly observed by Mr. Justice *Tracy*, that "no regard is to be had to expressions before or after making of the will, which possibly might be used by the testator on purpose to conceal or disguise what he was doing, or to keep the family quiet, or for some other secret motives and inducements; but the will that must pass land must be in writing, and must be determined only by what is contained in the written will" (*c*). To the same effect is the language of Lord *Mansfield*: "Guesses may be formed, but that is not enough. Perhaps, *quod voluit non dixit*. We cannot make a will for the testator" (*d*). So, Mr. Justice *Wilmot*: "The intention of a testator is to be collected from the whole of his will, *ex visceribus testamenti*; so as to leave the mind quite satisfied about what the testator meant; and as a will of lands must be in writing, such collection of the testator's intention must be founded upon the writing itself" (*e*). And Lord *Kenyon*: "The general rule which is laid down in the books, and on which alone courts can with any safety proceed in the decision of questions of this kind is, to collect the testator's intention from the words which he has used in

(*a*) 2 Atk. 373. 1 Eden, 39, & S. 455, 458.

94. (*c*) 2 Vern. 625.

(*b*) 5 Co. 68 b. 2 Vern. 625. (*d*) Doug. 78.

1 Salk. 234. 1 Eden, 94. 2 M. (*e*) 3 Burr. 1541.

his will, and not from conjecture" (a). Again : "In construing wills, we must take into consideration the short hints of the devisor, in order to discover his intention. To be sure, if the objection, *voluit sed non dixit*, had occurred, it could not have been got over. We could not have inserted words in the will, which would have varied the construction of those used, even if we thought that the devisor intended to have used them" (b). To the same effect the Lord Keeper *Northington*: "The ruling principle in the construction of wills is, that the court is bound to find out the intention of the testator, if it be possible so to do, however inartificially the will may be expressed. But this intention must be discovered from the words of the will itself, and not from extrinsic circumstances; and the court must proceed upon known principles and established rules, not on loose conjectural interpretations, or by considering what a man may be imagined to do in the testator's circumstances" (c).

The distinction has not been found in terms, but it appears to be authorised by the cases: if the words of a will fail to disclose an intention, collateral evidence is inadmissible to *discover* it; but if an intention is discovered, collateral evidence is admissible to *explain* it (d).

The words of a will may fail, in a degree or totally, to disclose an intention, by being *obscure* or *unintelligible*.

The Lord *Cheyney*'s case is an example of *obscurity* in a will. Sir *Thomas Cheyney* devised "to *Henry* his son,

(a) 3 T. R. 85.

(b) 5 T. R. 323.

(c) 1 Eden, 43.

(d) The common position, that collateral evidence is admissible to explain a *latent*, and is inadmissible to explain a *patent ambiguity* in a will (4 M. & S. 556),

seems inadequate to express this distinction. There appears, besides, to be an incorrectness in the position mentioned; for, clearly, a *patent* ambiguity in a will may be explained by evidence; as in *Abbot v. Massie*, 3 Ves. 148.

and to the heirs of his body, the remainder to *Thomas Cheyney of Woodley*, and to the heirs of his body, on condition that he or they, or any of them, shall not alien, discontinue, &c." It became a question, if witnesses might be received to prove that it was the intent and meaning of the devisor to include his son and heir within these words of the condition, "he or they," or only to restrain *Thomas Cheyney of Woodley*, and his heirs male of his body; and it was resolved that the evidence could not be received (a). In *Castledon v. Turner*, there is also an instance of *obscurity* in a will. The words of the will were: "I bequeath my lands to my wife *Alicia*, during her life; and after her decease, I give the lands to *Margaret Dinton*, niece to my said wife. *Item*. I give the use of 500*l.* stock, for and during her natural life; but after her decease, I give the 500*l.* among the brothers and sisters of my said wife." On the question to whom the word "*her*" in the will applied, Lord *Hardwicke* stated, that it could not be explained by evidence, and said that it must be determined by the will itself. On the words, he was of opinion the wife was entitled to the legacy (b).

The cases in the margin (c) appear to be farther instances of *obscurity* in wills.

In the following cases are examples of *unintelligible* words in wills.

In *Baylis v. The Attorney General*, on a bequest "to the ward of Bread-street, according to Mr. his will;" Lord *Hardwicke*, in giving judgment, said: "There are instances where this Court has admitted parol evidence to ascertain the person intended by the testator, where he

(a) 5 Co. 68.

(b) 3 Atk. 257.

(c) *Sir Litton Strode v. Lady Russell*, 2 Vern. 621. *Minshull*

v. Minshull, 1 Atk. 411. *Ulrich*

v. Litchfield, 2 Atk. 372. *Doe v.*

Meakin, 1 East, 456. *Doe v.*

Brown, 11 East, 441.

has been mentioned only by a nickname (a); or where there have been two persons who have had the same christian and surname; but I do not remember any case, where the Court has gone so far as to allow parol evidence of the intention of a testator, where there is only a blank;" and, in the case before him, his lordship would not permit the evidence to be read (b). In *Hunt v. Hort*, the testatrix devised her houses in town and at Richmond to her niece Dame *Margaret Hort*, and *Richard Baker*, in trust for sale; she then gave certain pictures specifically, and the will proceeded, "my other pictures to become the property of Lady ." (leaving a blank.) The testatrix made her niece *Harriet Hunt* her residuary legatee, whom she recommended to the care of Lady *Hort*, and appointed Lady *Hort* and *Richard Baker* her executors. Lord *Thurlow*, after consideration, said, "he could not supply the blank by parol evidence; and that where there is only a title given, it is the same as if it was a total blank" (c).

There are many cases which appear fully to authorise the position, that if an intention is discovered in a will, collateral evidence is admissible to explain it (d).

In the cases which follow, collateral evidence was admitted of *the person intended to be the devisee*.

A testator bequeathed "to Mr. *James Massie* of St. Martin's-lane, and *W. G.* 50*l.*, as executors: pint silver mug and all my china to Mrs. *G.*, and 10*l.* for mourning." Mr. and Mrs. *Gregg* claimed under the description of Mr. *G.* and Mrs. *G.* The Master refusing evidence that they were the persons intended, they excepted to the report.

(a) *Dowset v. Sweet*, Amb. 175. 3 Keb. 49; 3 Lev. 71; 1 Ves.

(b) 2 Atk. 239. & B. 470. 1 Madd. Rep. 437,

(c) 3 Bro. C. C. 311. 438, 439. *Gladding v. Yapp*, 5

(d) See 1 Salk. 7; 6 Mod. 199; Madd. Rep. 56.

Lord *Loughborough*: "The Master should receive evidence, but legal evidence, to prove who Mrs. G. is. I do not mean to tell the Master what evidence he is to receive" (a). A testator bequeathed, "to *Price*, the son of *Price*, the sum of 100*l*." A bill was filed for the legacy. No other person claimed it. In support of the plaintiff's claim, evidence was read, from which it appeared, that he was the son of a niece of the testator; that his father's and grandfather's name was *Price*; that the testator had no other relation of that name; that he lived on terms of affection with the plaintiff, contributed to his maintenance, placed him with an attorney, and paid the duty on that occasion; and that the testator said, he had or would provide for the plaintiff, and that he had left him something by his will. On the part of the defendants, the executors, it was said, "the residuary legatees are not satisfied of the plaintiff's right. The question is, whether he or his father is intended. It has been determined, that a legacy to Lady *Price* is void. *Master of the Rolls*: "This is quite a different case. This is only that the testator did not know the christian name. I am perfectly satisfied by this evidence; but if the executors insist upon an inquiry and advertisement, they must have it; but after this evidence, and the length of time that has elapsed without any other claim, there can be no doubt. The plaintiff's father can have no claim. There is positive evidence that the testator contributed to the plaintiff's maintenance, placed him with an attorney, said he would provide for him, and had left him something by his will" (b). A testator gave "an equal share of his real estate to his two sons *James* and *Charles Rivers*." Lord *Hardwicke* stated the question to be, "whether, as it appears that *James* and *Charles* are illegitimate children

(a) *Abbot v. Massie*, 3 Ves. 148. (b) *Price v. Page*, 4 Ves. 680.

of the testator, this is such a description of their persons as will entitle them to take under the will? In the case of a devise, any thing that amounts to a *designatio personæ* is sufficient; and, though in strictness they are not his sons, yet, if they have acquired that name by reputation, in common parlance they are to be considered as such. It has been said, the testator has likewise made a mistake in their names, and therefore they cannot take; but the law is otherwise; for if a man is mistaken in a devise, yet if a person is clearly made out, by averment, to be the person meant, and there can be no other to whom it may be applied, the devise to him is good" (a). A person bequeathed 500*l.* to *Catherine Earnley*. The name of the person who claimed this legacy was *Gertrude Yardley*; and it was insisted by her and admitted, that no person named *Catherine Earnley* claimed the legacy. By evidence, it appeared that the testator's voice, when he made his will, was very low, and hardly intelligible; that the testator usually called the legatee of this 500*l.*, *Gatty*, which the scrivener who took instructions for drawing the will, might easily mistake for *Katty*; and that the scrivener, not well understanding who the legatee was, or what was her name, the testator directed him to *I. S.* and his wife, to inform him farther, who afterwards declared, that *Gertrude Yardley* was the person intended. It was moreover proved, that the testator in his life-time had declared he would do well for her by his will. It was objected, that the Statute of Frauds requires a will to be in writing, and a will in writing, giving a legacy to *Catherine Earnley*, cannot be a writing to entitle *Gertrude Yardley* to the legacy, for that both the christian and surnames are entirely different; and by the same reason it may be maintained, that a legacy given to *A. B.* is a good legacy to *C. D.* But

(a) *Rivers' Case*, 1 Atk. 410.

the *Master of the Rolls* determined, "that the legacy was a good legacy to *Gertrude Yardley*, although the same was given by the will to *Catherine Earnley*" (a). A testator bequeathed 100*l.* to "*John and Benedict, sons of John Sweet.*" *John Sweet* had two sons only, *James* and *Benedict*. On the question, whether *James Sweet* should take under the description of *John*, it was held clearly that he should, even if it stood on the will, and the other fact only; but it was proved the testator used to call him *Jackey* (b). A person, by her will, gave one-sixth of the residue of her personal estate, in trust to be put out at interest, and the interest to be paid to her niece *Mary Bradwin*, for life; and after her death, one moiety of the one-sixth to be paid to the said *Mary Bradwin's* grandchildren, the children of her daughter *Mary*, at their age of twenty-one; and the other moiety to be paid to *Anne*, the daughter of her said niece *Mary Bradwin*." *Mary Bradwin*, the niece, had two children; *Mary*, who was never married, and *Anne*, who married *Robert Barnes*, and died in the life-time of the testatrix, and before the making of her will, leaving two children, *William* and *Robert Barnes*. On a bill, that one moiety of the money might be paid to the plaintiff *Mary*, and the other moiety to the two *Barnes's* on their attaining twenty-one, on the foundation that the testatrix so intended, but, by a mistake of names, had given a moiety to the children of *Mary*, who never was married, and the other moiety to *Anne*, who had died before the will was made, leaving the children; it was proved that the testatrix was eighty years old at the time of making her will, and lived in *Derbyshire*, and that *Mary Bradwin* her niece, and her family, lived at *St. Alban's*, in *Hertfordshire*; and that the testatrix had

(a) *Baumont v. Fell*, 2 P. W.(b) *Dowset v. Sweet*, Amb. 173.

never seen her niece's children or grand-children. The *Master of the Rolls* decreed the money to be paid to the plaintiffs, according to the intention (a).

The cases cited in the margin (b) are farther instances, in which collateral evidence has been admitted in explanation of *the person intended to be the devisee*.

In the cases which follow, collateral evidence has been admitted in explanation of various other parts of a will.

A person devised to one *Hodgson* several closes, paying 100*l.* he owed to *J. S.*, and 100*l.* he owed by bond to one *Shaw*. It appeared that the 100*l.* due on bond was not due to *Shaw*, but to a *Mrs. Fitch*; and evidence to this effect was offered and received; the Lord Chancellor declaring "he saw no hurt in admitting of collateral proof to make certain the person or the thing described (c)." A testator bequeathed to his wife, *Elizabeth Mildmay*, the interest and proceeds of 1250*l.*, "part of my stock in the 4 *per cent.* annuities in the Bank of England, for and during the term of her natural life, together with such dividends as shall be due on the said 1250*l.* at the time of my decease;" and, after the decease of his wife, he bequeathed the said stock to several of his relatives, always calling it his 4 *per cent.* stock. There was evidence, that the testator had no such stock at the date of his will, having previously sold it all, and invested the produce in *Long annuities*; and this evidence was received. The *Master of the Rolls*, in giving judgment, observed, "the principles of the cases determined are so clear, that I have no difficulty in saying, that a latent ambiguity arises from the testator's circum-

(a) *Bradwin v. Harpur*, Amb. Ves. jun., 266. *Smith v. Coney*, 374. 6 Ves. 42. *Swaine v. Kennerley*,

(b) *Hampshire v. Pearce*, 2 Ves. 1 Ves. & B. 469.

216. *Hussey v. Berkeley*, 2 Eden. (c) *Hodgson v. Hodgson*, 2 194. *Del Mare v. Rebello*, 3 Bro. Vern. 593.

C. C. 446. *Parsons v. Parsons*, 1

stances not being sufficient to meet the legacy he had given. There is no ambiguity upon the will. Then the question is, whether the Court is not bound, by every rule, to admit evidence where there is no ambiguity upon the will. In this case, the evidence is to prove, not that it is a mistake, for that is clear, but to shew how that mistake arose; and when one reads what the case was, it would be unjust to refuse to rectify a mistake so clearly and naturally accounted for. The testator had instructed a broker to sell out his 4 per cent. stock; and the identical money produced by that sale was invested in this *Long annuity*. Nothing is now doubtful. It is clear the testator meant to give a legacy, but mistook the fund. He acted upon the idea that he had such stock" (a). In *Goodtitle v. Southern*, the defendant claimed under the following devise in the will of *Richard Southern*: "I give and devise all that my farm, lands, and hereditaments, called *Trogues-farm*, situate within the parish of *Darley*, in the county of *Derby*, now in the occupation of *A. Clay*, unto my brother, *John Southern*, and to his heirs and assigns for ever." The lessor of the plaintiff claimed under the residuary clause in the same will, which, it was admitted, would entitle him to the premises in question, provided they did not pass to the defendant under the above devise. On the part of the lessor of the plaintiff, it was proved that *Trogues-farm* was in the occupation of *A. Clay*; but the closes in question were not in his occupation, but in the occupation of one *Marsden*; and in order to shew that they were not parcel of *Trogues-farm*, and that the testator, *Richard Southern*, did not take them as such, the will of one *Houghton* was produced, which contained the following devise to *Richard Southern*: "Also all that piece or parcel of ground, situate in the liberty of *Wansley*, and in the parish of *Darley*,

(a) *Selwood v. Mildmay*, 3 Ves. 306.

commonly called, or known by the name of, *Trogues*, otherwise *Trough's-pasture*; and also all those two closes of land, situate at the bottom of the pasture called *Trogues*, otherwise *Trough's-pasture*, called by the name of the *Dale-closes*." *Richard Southern*, when he became entitled to this land under *Houghton's* will, let the two closes to *Marsden*; and evidence was offered of payment of rent by *Marsden* to *Richard Southern*, in order to shew that *Richard Southern* knew in whose occupation the land was. On the part of the defendant, a notice to quit was proved, which had been given to *Marsden* by *Richard Southern*, a few months before the time of making his will; which notice was in these terms: "I do hereby give you notice to quit and deliver up the possession of all my lands belonging to, and called, *Trogues-farm*, situate in the parish of *Darley*, now in your possession, on or before Lady-day next." This evidence was objected to by the counsel for the plaintiff, but was accepted on the trial. The point of its admissibility was afterwards argued in the court of King's Bench, where it was decided the evidence was admissible. "Parcel or no parcel," said Lord *Ellenborough*, "is always a question of evidence for a jury; and in the same manner it was competent to shew here, if there was any doubt, that the two closes were parcel of *Trogues-farm*, by which name the thing devised was sufficiently ascertained." And by Mr. Justice *Bayley*: "The testator devises 'all his farm called *Trogues-farm*;' and it was competent to shew by evidence of what parcels that farm consisted" (a).

The cited cases (b) are farther instances in which col-

(a) 1 M. & S. 299.

Read, 1 Ves. jun. 259. Down

(b) *Pendlestone v. Grant*, 2 Vern. 517. *Fonnereau v. Poyntz*, 1 Bro. C. C. 472. *Baugh v.*

v. Down, 7 Taunt. 343. *Doe v. Pigott*, *ibid*, 554.

lateral evidence has been admitted in explanation of the intention in a will.

The effect of evidence, admitted in explanation of a will, necessarily depends on the circumstances it discloses. The evidence, when admitted, may amount to nothing; as in *Hussey v. Berkeley* (a); or, as in *Thomas v. Thomas* (b), it may involve the testator's intention in so much doubt, as to set aside the particular devise altogether, in favour of the heir at law.

It further appears, if the evidence offered in explanation of a will tends to have no legal effect, it is irregular to accept it (c).

It remains to remark, that, in *all* cases, it is the intention, which the words of the will express, that the law carries into effect. Collateral evidence is not permitted to introduce an intention on the words of a will, that, with the explanation the evidence affords, is not expressed by those words (d).

(a) 2 Eden, 194.

(b) 6 T. R. 671.

(c) *Doe v. Oxenden*, 3 Taunt.
147. *Doe v. Greening*, 3 M. & S.

171. *Doe v. Lyford*, 4 M. & S. 550.

(d) See 1 Ves. & B. 462.

Swaine v. Kennerley, *ibid*, 469;
also, 9 East, 462.

CHAPTER IV.

TECHNICAL WORDS NOT REQUIRED IN A WILL.

THE words of a will are the means to collect the intention; and, as a testator is not supposed (*a*) to be acquainted with legal language, the law neither requires nor expects (*b*) *technical* (*c*) words in a will.

If it is the intention,

Land will pass under the word, "effects" (*d*); or "property" (*e*); or the words "personal estate" (*f*);

The word *legacy* will apply to *real* property (*g*);

A *fee-simple* will pass by a devise "for ever" (*h*); by a devise of "all I am worth" (*i*); by a devise "of my property" (*j*); by a devise in the words: "A. B. I make my sole heir" (*k*); by a devise "to A., B. and C. and the survivors and survivor of them, and the executors and administrators of such survivor" (*l*); by a devise in the words: "I devise all my lands, tenements, and hereditaments, to A. Item, I devise all my goods and chattels, money and debts, and whatever else I have not before disposed of, to A." (*m*).

These examples are ample to prove that *technical* words are not required in a will.

(*a*) 2 Atk. 580.

(*b*) 5 T. R. 721.

(*c*) 1 Salk. 237. 6 Mod. 110.
5 T. R. 721. 2 East, 39. 2 Atk. 575.

(*d*) Doe v. White, 1 East, 33.
Doe v. Lainchbury, 11 East, 290.
Den v. Trout, 15 East, 393. See
also Cowp. 307. Camfield v.
Gilbert, 3 East, 522. Doe v.
Dring, 2 M. & S. 448. Doe v.
Hurrell, 5 B. & A. 18.

(*e*) Doe v. Lainchbury, 11
East, 290. See also, *ibid*, 524.
Doe v. Langlands, 14 East, 370.
Roe v. Pattison, 16 East, 221.
Noel v. Hoy, 5 Madd. 38.

(*f*) Doe v. Tofield, 11 East, 246.

(*g*) Hope v. Taylor, 1 Burr.
269. Hardacre v. Nash, 5 T. R.
716. See also Doug. 39. 2. P. W.
186.

(*h*) Doe v. Roper, 11 East, 518.
(*i*) Huxtep v. Brooman, 1 Bro.
C.C. 437. See 14 East, 373.

(*j*) Roe v. Pattison, 16 East,
221. Doe v. Langlands, 14 East,
370.

(*k*) Beauclerk v. Dormer, 2
Atk. 308. See Jackson v. Kelly, 2
Ves. 285, and 3 Keb. 49.

(*l*) Rose v. Hill, 3 Burr. 1881;
see *ibid*, 1885.

(*m*) Hopewell v. Ackland, 1
Salk. 239.

CHAPTER V.

TECHNICAL FORMS OF CONVEYANCE NOT REQUIRED IN A WILL.

TESTATORS are supposed to be *inopes consilii*; and, therefore, if the substance of their wills is legal, although a will of land is a conveyance (*a*), the technical *forms* of conveyance are not required of them (*b*).

A testator cannot place the freehold in abeyance (*c*); nor limit a fee on a fee (*d*); nor, possessed of a term of years, can he limit a remainder (*e*) of it. But he may limit a freehold estate to commence at a future day (*f*); the fee-simple to A., and, on a contingency, to B. (*g*); and, possessed of a term of years, he may devise it to A. for his life, and, after his death, to B. (*h*); provided, in each instance, the devise does not infringe on the law against a perpetuity (*i*). Neither of the three devises is good by the common law of conveyances; but, on the principle that a testator is supposed to be unacquainted with technical form, the intention in these devises not being illegal, their form is dispensed with. They are called *executory* devises. They are devises which the law will *execute*; in other words, carry into effect, according to the testator's intention (*k*). But in supplying their form, the law, it should seem, per-

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| (a) Cowp. 306. | 590. Doe v. Wetton, 2 Bos. & |
| (b) 6 Mod. 110. Ridout v. | P. 324. Right v. Day, 16 East, |
| Dowding, 1 Atk. 419. | 67. |
| (c) Butl. Co. Litt. 216 a (2). | (h) Mathew Manning's Case, 8 |
| (d) Tilbury v. Barbut, 3 Atk. | Co. 95. Lampet's Case, 10 Co. 47. |
| 617. Cro. Eliz. 591. | (i) 7 T. R. 102. |
| (e) 8 Co. 95. | (k) 2 Bl. C. 172. See 1 Ves. |
| (f) Pay's Case, Cro. Eliz. 878. | jun. 255. |
| (g) Pells v. Brown, Cro. Jac. | |

44 TECHNICAL FORMS OF CONVEYANCE NOT REQUIRED.

mits these devises to have no farther effect than the technical limitations would have, which, with legal advice, the testator might have put into his will.

The law very much favours freedom of alienation, and gladly unfetters long settlements, whenever it is able to do so. To this end, it invariably inclines to construe a limitation over to be a *contingent remainder* rather than an *executory devise*. Executory devises are not favoured in the exposition of wills, for this reason, that they cannot be barred by any means whatever ; and, consequently, they present the greatest impediment to alienation. Contingent remainders are easily destroyed. Whenever, therefore, a limitation over can take effect as a contingent remainder, it is never construed to be an executory devise (a).

(a) 3 T. R. 765. 2 Bos. & P.295, 327.

CHAPTER VI.

ANY WORDS WILL EFFECT A LEGAL INTENTION.

It has been seen that technical words are not required in a will. Any words will effect a legal intention. Provided the testator makes a legal disposition of his property;—the position is not too general,—it is no matter what words he uses for the purpose.

This position it may be useful to exemplify in words of *property*; in words of *estate* in property; in words *naming the devisee*.

1. *If it is the intention,*

Land will pass under the words “*rents of land*” (a);

By the word “*house*,” the *outbuildings* used with it will pass, although themselves not named (b);

A *leasehold* estate will pass under the word “*farm*” (c);

By the words “*freehold houses in A.*,” the testator having none but *leasehold* houses there, the *leasehold* will pass (d).

2. If it is the intention, an estate in *fee* will pass under the words :—

“*Interest*” (e);

“*All that I shall die possessed of, real and personal, of what nature and kind soever*” (f);

“*All the property of whatever description or sort that I may die possessed of*” (g);

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| (a) <i>Kerry v. Derrick</i> , Cro. Jac. 104. | (e) <i>Andrew v. Southouse</i> , 5 T. R. 292. |
| (b) <i>Doe v. Collins</i> , 2. T. R. 498. | (f) <i>Pitman v. Stevens</i> , 15 East, 505. |
| (c) <i>Lane v. Earl Stanhope</i> , 6 T. R. 345. | (g) <i>Noel v. Hoy</i> , 5 Madd. 38. |
| (d) <i>Day v. Trig</i> , 1 P. W. 286. | |

"My share of the Bastile, and other estates, situate at Coventry" (a) ;

"To be kept in the family and name of the W.'s as long as can be" (b) ;

"All my mortgages" (c) ;

"Reversion" (d) ;

"All my real property" (e) ;

"Inheritance" (f) ;

"To A., and if he shall happen to die in his minority," [remainder over] (g) ;

"I give to A. and B. the four houses built by me; but if either of them should die before twenty-one, the survivor shall be heir to the other two houses" (h).

If it is the intention, an estate *in tail general* will pass by a limitation :

"To A. and the heir of his body" (i) ;

"To A. and his children" (k) ;

"To A. and his issue" (l) :

And an estate *in tail-male* will pass by a limitation :

"To A. and his heirs male" (m) ;

"To A. and his men-children" (n) ;

"To A. and his issue male" (o).

It is a distinction, on a devise simply "to A. and his children;" or "to A. and his issue;" if, at the time of the devise, A. has no children, he will take an estate-

(a) *Paris v. Miller*, 5 M. & S. Burr. 1618. See *ibid*, 1623; 9 East, 403; also *Tomkins v. Tomkins*, cited 9 East, 404.

(b) *Doe v. Wood*, 1 Barn. & A. 518. (h) *Doe v. Cundall*, 9 East, 400.

(c) *Cripps v. Grysil*, Cro. Car. (i) Cro. Eliz. 314.

37. See *ibid*. 450. (k) 6 Co. 17.

(d) *Bailis v. Gale*, 2 Ves. 48. (l) *Ibid*.

(e) *Nichols v. Butcher*, 18 Ves. 193. (m) Lord Ossulton's case, 3 Salk. 336. 11 Mod. 189.

(f) *Widlake v. Harding*, Hob. 2. (n) 6 Co. 17 b.

(g) *Frogmorton v. Holyday*, 3 (o) Cro. Eliz. 40.

tail (a) ; but if at the time of the devise A. has children, the children will take, as purchasers, a life estate jointly with their parent (b).

It having been the intention ; under the words " leasehold ground-rents," the leasehold *estate* in the land was held to pass, and not merely the rents reserved on underleases (c).

It being the intention ; a reversion, *of which the testator was seised*, has been held (d) to pass under the words :—

" I will that *Fortune*, my wife, shall have to her use and occupation all that my living which I now do occupy, so long as she do keep my name, until such time as my son, *John Scatergood*, shall come to the age of twenty-one years ; and that then she have the thirds *of all my living* (e) ;"

" I devise all my free and copyhold land to my executors, for the performance of my will, and the will of my father [in which were several legacies] ; to have and to hold to them, and every of them ; they to take the profits of it for ten years to the use of my will ; and I will that afterwards my executors, or one of them, shall sell the land, and distribute the money in performance of the said will "(f) ;

" I devise *Spain's Hall to Thomas Kemp* ; to have to hold the said lands, from and after a year after my decease, and after the decease of my daughter" [on whom part of the

(a) 6 Co. 17. 17 b. Davie v. 12 East, 141. Ridout v. Pain, 2 Atk. 486. 1 Ves. 10.

(b) 6 Co. 17. 17 b. Doug. (e) Rowland v. Doughty, Cro. 310. Jac. 649.

(c) Kaye v. Laxon, 1 Bro. C. C. (f) Hawes v. Coney, Cro. Eliz. 76. 159. Townshend v. Wale, *ibid.*

(d) See also Doe v. Wetherby, 524.
11 East, 322. William v. Thomas,

estate had been settled for life] remainder over in tail (a);

"I devise, &c., all other my lands, tenements, and hereditaments out of settlement" (b);

"I devise, &c., all my lands, tenements, and hereditaments in the three towns of *Littleton*, *Marston*, and *Milbrooke*, or elsewhere, not by me formerly settled" (c);

"To my son *Daniel*, I give 4*l.* per annum of my ground-rent, his heirs and assigns for ever" (d);

"I devise, &c., all that my part, purport, and portion of and in the tenements called and known by the name of *Henson*, within the parish of *St. Minver*" (e);

"I give and devise all that my messuage or tenement, with the barn, stable, and other buildings thereto belonging; which said messuage or tenement, buildings, lands, and premises, are now in my own possession; and all other my real estate whatsoever, in *Murrey*, or elsewhere, in the parish of *Yoxall*, in the county of *Stafford*, or in any other place whatsoever, in Great Britain, to my wife, *S. B.*, and her assigns, for and during the term of her natural life" (f).

A reversion, *created in the will*, has been held to pass, under the words:—

"I devise the manor of *A.*, in *Somersetshire*, to *B.*, for six years. And the rest of all my lands in *Somersetshire*, or elsewhere, I give to my brother, and the heirs of his body" (g);

"I devise to *Edward Harris*, and *Mary*, his wife, a messuage in the parish of *St. Martin in the Fields*,

(a) *Cook v. Gerrard*, 2 Keb. 206.
224. 1 Lev. 212.

(b) *Strode v. Lady Russell*, 2
Vern. 621.

(c) *Chester v. Chester*, 3 P. W.
56.

(d) *Maundy v. Maundy*, 2 Stra.
1020.

(e) *Doe v. Phillips*, 1 T.R. 105.

(f) *Doe v. Meakin*, 1 East, 456,
457.

(g) *Wheeler v. Walroone*, Aleyn.
28.

for their lives; and the better to enable my wife to pay my legacies, I devise all my messuages, lands, tenements, and hereditaments whatsoever, within the kingdom of England (not above disposed of), to have and to hold to her and her assigns for ever "(a) ;

"I devise all my lands, tenements, and hereditaments, to A. Item, I devise all my goods and chattels, money and debts, and whatever else I have not before disposed of, to the said A."(b);

"I devise, &c., to A. for life, [remainders over, remainder to the testator's own right heir]; and all the rest, residue, and remainder of my goods, chattels, and personal estate, together with my real estate, not hereinbefore devised, I give to the said A."(c).

3. Subject to intention,

Any words which describe the devisee are sufficient.

A question may arise if a person is well described; but if the words of the will name a person, and there is evidence to prove a particular person to be the object meant, the devise will be valid, in whatever words the devisee may be described.

"In the case of a devise," Lord *Hardwicke* has said, "any thing that amounts to a *designatio personæ* is sufficient; and although [adverting to the particular case before him] in strictness they are not his sons; yet if they have acquired that name by reputation, in common parlance they are to be considered as such. It has been said, the testator has likewise made a mistake in their names, and therefore they cannot take; but the law is otherwise; for if a man is mistaken in a devise, yet if a person is

(a) *Willows v. Lydcot*, 2 Vent. 285.

(c) *Ridout v. Pain*, 3 Atk. 486; 1 Ves. 10.

(b) *Hopewell v. Ackland*, 1 Salk. 239.

clearly made out by averment to be the person meant, and there can be no other to whom it may be applied, the devise to him is good (a)."

"The rule," it has been said by Lord *Eldon*, "cannot be stated too broadly, that the description, 'child, son, issue,' every word of that species, must be taken *primâ facie* to mean *legitimate* child, son, or issue (b)." It is only, however, *primâ facie*; for either of the words, if it is the intention, may mean *illegitimate* offspring,

There are distinctions between devises to illegitimate children, born, in *ventre sa mere*, and not *in esse*.

If a person devises to a *born* illegitimate child of A., the father or mother, the devise is legal; but to enable the child to take, it must *at the time of the devise* be known, by reputation, as the child of A. Parol evidence is admissible to prove the fact; and, if proved, and the child appears in the will to be the object of the devise, it will be entitled to take under it (c).

There appears to be the distinction, that parol evidence is admissible to prove an illegitimate child has gained a name by reputation, but it is not admissible to prove an illegitimate child is intended in a devise: *This* must appear in the will itself. Not to confine a devise to legitimate children, there must be evidence in the will itself to extend it to children which are not legitimate (d).

If a person devises to an illegitimate child of A., the *father*, the child being in *ventre sa mere* when the will is

(a) *Rivers' case*, 1 Atk. 410.

(b) 1 Ves. & B. 462.

(c) *Wilkinson v. Adam*, 1 Ves.

& B. 422. *Metham v. Duke of Devon.* cited, *ibid.* 458. *Beachcroft*

v. Beachcroft, 1 Madd. Rep. 430.

(d) *Cartwright v. Vawdry*, 5 Ves.

530. *Godfrey v. Davis*, 6 Ves. 43.

1 Ves. & B. 463, 470. *Swaine v. Kennerley*, *ibid.* 469.

made, it appears the devise is not legal, and therefore the child will not be able to take under it (a).

But if a person devises to an illegitimate child of A., the *mother*, the child being in *ventre sa mere* when the will is made, the devise is legal; and, if the description of the child in the will proves it to be the object of the devise, it will be entitled to the estate devised to it (b).

If a person devises to an illegitimate child of A., the father, or mother, the child not being *in esse*, neither born, nor in *ventre sa mere*, when the will is made, it should seem the devise is illegal; and, therefore, notwithstanding A. has afterwards an illegitimate child, the devise is void (c).

As, provided the intention is made out, *any words* which describe the devisee are sufficient, it has been determined that grand-children, if there are no children, may take under a devise to children (d); a second born son, the eldest at the death of the testator, may take under a limitation to "the first son" (e); a first born, and only son, born within a year after the death of the testator, may be entitled under a devise to "the youngest child born within twelve months after the testator's death" (f); an eldest son may take under the name of "heir," in the life-time of

(a) *Earle v. Wilson*, 17 Ves. 528. See 1 Mer. 151, 153.

(b) *Gordon v. Gordon*, 1 Mer. 141.

(c) *Metham v. Duke of Devonshire*, 1 P. W. 529. See 1 Ves. & B. 452, 468. 1 Mer. 145.

(d) *Crooke v. Brookeing*, 2 Vern. 106. See 1 Ves. 201. *Gale v. Bennett*, Amb. 681. *Wythe v.*

Thurleston, *ibid.* 555. *Wythe v. Blackman*, 1 Ves. 196.

(e) *Lomax v. Holmden*, 1 Ves. 290.

(f) *Emery v. England*, 3 Ves. 232. See *Duke v. Doidge*, 2 Belt Ves. sen. 203, note (a). *Lady Lincoln v. Pelham*, 10 Ves. 166. *Bowles v. Bowles*, *ibid.* 177.

his father (*a*) ; an eldest daughter may take under the name of " heir," in exclusion of her sisters (*b*) ; a child in *ventre sa mere* may be entitled under a devise to children, " living at *A.*'s death" (*c*) ; on a devise " to the heirs male" of a person, the heir male, although he is not the heir general, of that person, may take under the devise (*d*). The intention of the testator is permitted, in the last instance, to raise an exception to the general rule, that, to take by purchase, the heir must be heir general, as well as heir male. " There is a distinction," Lord *Hardwicke* has observed, " between taking by descent and by purchase ; in case of the former, it is sufficient to be nearest in descent, claiming all along through males, notwithstanding an heir female be heir general, and this by the statute *de donis* ; but to take by purchase, he must be heir general, as well as heir male ; agreeable to this is Co. Litt. 24 b, which is transcribed from his own argument in *Shelley's* case.—I am of opinion there may be an exception to the rule before laid down, appearing clearly by the intention of the testator" (*e*).

(*a*) *James v. Richardson*, 1 Vent. 334. *Burchett v. Durdant*, 2 Vent. 311. S. C. *Darbison v. Beaumont*, 1 P. W. 229.

(*b*) *Tilly v. Collier*, 2 Lev. 162.

(*c*) *Beale v. Beale*, 1 P. W. 244. *Ibid.* 342. *Clarke v. Blake*, 2 Bro. C. C. 320. 2 H. Bl. 399. 2 Ves.

jun. 673. *Trower v. Butts*, 1 Sim. & St. 181.

(*d*) *Newcoman v. Bethlem Hospital*, Amb. 8. *Wills v. Palmer*, 5 Burr 2615.

(*e*) Amb. 10, 11. See Harg. Co. Litt. 24 b. (3), 164 a. (2).

CHAPTER VII.

OF THE USE OF TECHNICAL WORDS IN AN UNTECHNICAL SENSE.

TECHNICAL words are not required in a will; nor, if they are used, will they bear their technical signification, if the testator explains his own meaning of them (a).

"Heirs" (b), and "heirs of the body" (c), are, technically, words of *descent*; yet, if it is the intention, "*heirs*" (d), or "*heirs of the body*" (e), will be accepted as words of *purchase*.

"Issue" (f), "children" (g), "son" (h), are, technically, words of *purchase*; yet, either "*issue*" (i), "*children*" (k), or "son" (l), will, if it is the intention, be accepted as a word of *descent*.

The technical meaning of "*estate*," is ownership of land (m); yet, if it is the intention, it will be accepted to signify the land itself (the popular meaning of the word), and not the interest in it (n).

(a) See 2 Ves. & B. 370. 5 222. 2 Vern. 545. 5. T. R. 323. Madd. Rep. 39. Goodtitle v. Wodhull, Willes, 592.

(b) 2 Ld. Ray. 1440.

(h) 5 T. R. 323, 324. See 2

(c) 11 East, 671.

Barn. & C. 533.

(d) Archer's case, 1 Co. 67. Watkins' Desc. 170.

(i) 2 Atk. 582. 4 T. R. 299.

(e) Lowe v. Davies, 2 Ld. Raym. 1561. Doe v. Laming, 2 Burr. 1100. Harris v. Barnes, 4 Burr. 2157. Amb. 666. Goodtitle v. Herring, 1 East, 264. Bagshaw v. Spencer, 2 Atk. 577. 1 Ves. 142. Doe v. Goff, 11 East, 668.

(k) Davie v. Stevens, Doug. 306. See Hodges v. Middleton, *ibid.* 415.

(f) 2 Ld. Raym. 1440. 2 Atk. 582. 4 T. R. 299. 6 Co. 17 b. 2 Vern. 546.

(l) Chapman v. Brown, 3 Burr. 1626. 5 T. R. 323. Mellish v. Mellish, 2 Barn. & C. 520.

(m) 6 Mod. 107.

(g) 6 Co. 16 b. 17, 17 b. 2 Atk.

(n) Goodwyn v. Goodwyn, 1 Ves. 226. Cowp. 306. 2 T. R. 659. Pettiward v. Prescott, 7 Ves. 541. Knotsford v. Gardiner, 2 Atk. 450.

The word "*estate*," in its most extensive technical meaning, signifies both *real* and *personal* (a) property ; yet, if it is the intention, it will be accepted to mean *personal* property alone (b).

Both the technical and popular meaning of "*effects*," is *personal* property (c) ; yet it may mean *real* property, if the testator uses the word in that sense (d).

(a) 6 Mod. 107.

(c) Doe v. Dring, 2 M. & S.

(b) Doe v. Hurrell, 5 Barn. & 448.

A. 18.

(d) Hogan v. Jackson, Cowp.
299. Doe v. White, 1 East, 33.

CHAPTER VIII.

OF DEFECTIVE EXPRESSIONS IN A WILL.

It is sufficient if the words in a will make known the testator's intention. A defective expression the law will rectify. If words are omitted, they will be understood to be implied (*a*). Any word, incorrectly used for another, will be taken in the sense the testator meant it (*b*). In particular, the word "*or*," is constantly construed "*and*" (*c*). Also "*and*" may be construed "*or*" (*d*). And, generally, any words, which the remainder of the will proves to be incorrect to express the testator's meaning, will be accepted in the sense intended (*e*).

(*a*) *Spalding v. Spalding*, Cro. Car. 185. *Strong v. Cummin*, 2 Burr. 767. *Fonnereau v. Fonnereau*, 3 Atk. 315. *Doe v. Hicks*, 7 T. R. 433. *Doe v. Micklem*, 6 East, 485.

(*b*) *Bullock v. Stones*, 2 Ves. 521.

(*c*) *Soulle v. Gerrard*, Cro. Eliz. 525. *Walsh v. Peterson*, 3 Atk. 193. *Framlingham v. Brand*, 3 Atk. 390. *Wright v. Wright*, 1 Ves. 409. *Brownsword v. Edwards*, 2 Ves. 243. (See *Doe v.*

Jessop, 12 East, 288). *Denn v. Kemeys*, 9 East, 366. *Eastman v. Baker*, 1 Taunt. 174. *Right v. Day*, 16 East, 67.

(*d*) *Jackson v. Jackson*, 1 Ves. 215.

(*e*) *Luxford v. Cheeke*, 3 Lev. 125. *Newland v. Shephard*, 2 P. W. 194. *White v. Barber*, 5 Burr. 2703. *Amb. 701. Rudsell v. Rudsell*, 5 Burr. 2806. See also *Doe v. Stenlake*, 12 East, 515. *Hewet v. Ireland*, 1 P. W. 426.



CHAPTER IX.

WORDS OF INTENTION ARE WORDS OF DEVISE.

SECTION I.

Implication of Estates.

WORDS of intention in a will are words of devise. A testator is not required to expand his intention in formal limitations of devise; it is enough if the words of intention imply them. Words of limitation (*a*), and estates for life (*b*), and in tail (*c*), have been implied in the authorities cited in the margin.

It appears to be a distinction, if a person, seised in fee, devises to his *heir at law*, after the death of *A.*; *A.* will, by implication, take an estate for life; but if the devise is to a *stranger*, *A.* will not, by implication in this case, take any estate; but, until *A.*'s death, the land will descend to the heir at law (*d*).

Farther, the law will not understand a devise to be implied in the words of a will, if the devise, in the particular case, would be an unreasonable one (*e*); or there are other words in the will to negative the implication contended for (*f*).

(*a*) *Evans v. Astley*, 3 Burr. 1570. *Fen v. Lowndes*, 4 Burr. 2246.

(*b*) *Higham v. Baker*, Cro. Eliz. 15. Cro. Jac. 75. *Blissett v. Cranwell*, 3 Lev. 373. *Roe v. Summer-set*, 5 Burr. 2608. *Doe v. Bowling*, 5 Barn. & A. 722. See also *Aspinall v. Petvin*, 1 Sim. & St. 544.

(*c*) *Stanley v. Lennard*, 1 Eden,

87. Amb. 355. *Doe v. Halley*, 8 T. R. 5.

(*d*) Cro. Jac. 75. *Doe v. Bowling*, 5 Barn. & A. 722. 4 Bro. C. C. 534, 535. 1 Sim. & Stu. 550.

(*e*) *Horton v. Horton*, Cro. Jac. 74.

(*f*) *Boon v. Cornforth*, 2 Ves. 277.

SECTION II.

Implication of Cross-remainders.

IF *A.*, seised in fee, devises to *B.*, *C.*, and *D.*, for their lives, in sole (*a*), tenancy or in common, with cross-remainders between them; on the death of *B.*, his land will remain to *C.* and *D.*, as tenants in common; and, at the death of *C.*, the whole will remain to *D.* for his life. So, if the devise is to them in tail, with cross-remainders between them; on the death of *B.*, and failure of the heirs of his body, *B.*'s land will remain to *C.* and *D.*, as tenants in common in tail; and on the death of *C.*, and failure of his issue, the whole will remain to *D.* in tail. In these instances, the next remainder-man, or reversioner (as the case may be), is not entitled to the land until all the particular estates to *B.*, *C.*, and *D.*, and the remainders to them, are determined (*b*).

It is legal to devise to any number of persons with cross-remainders between them. If they are not *expressly* limited, words in the will may be understood to *imply* (*c*) them. They are often implied in a limitation over; but, it should seem, the law will accept *any* (*d*) words of intention to imply them.

Cross-remainders, like every other part of a will, depend on the intention. If it is *not* the intention to give the land of each of the several devisees, on the determination of his estate, away from his co-devisees, but to the survivors; then cross-remainders *are* limited. But if it *is* the intention to give the land of each of the several devisees, on the determination of his estate, away from his co-devisees, to

(*a*) *Chadock v. Cowley*, Cro.Jac. 695.

(*b*) 4 T. R. 713. 1 Taunt. 239.

3 Barn. & A. 428.

(*c*) *Doe v. Burville*, 2 East, 47, note (*d*). 1 Taunt. 237, 239.

(*d*) 3 Barn. & A. 428, 429.

a remainder-man, or the reversioner, then cross-remainders are *not* limited.

Cross-remainders have been held to be implied in the devises which follow (a) :

“ I will that the third part of all my lands shall descend and come to my son and heir ; and the other two parts I give and bequeath to my four younger sons, *A.*, *B.*, *C.*, and *D.*, and to the heirs male of their bodies begotten ; and if the infant *in ventre ma feme* shall be a son, then he to have his fifth part as co-heir with his four youngest brothers ; and if they all five shall happen to die without issue male of their bodies, or any of their bodies, lawfully begotten, then I will that the said two parts shall revert, remain, and come to my next heirs for ever” (b).

“ I devise, &c. to the use of all and every the daughter and daughters of *Peter Holford*, and *Constantia Maria Holford*, lawfully to be begotten, and to the heirs of their body and bodies ; such daughters, if more than one, to take as tenants in common, and not as joint tenants ; and, for default of such issue, to the use of my right heir” (c).

“ I give, devise, and bequeath all those my lands, tenements, and hereditaments, situate and being at *Merton Abbey*, in the county of *Surry*, unto my loving brothers *William Phipard* and *John Phipard*, and sister *Elizabeth Cleaves*, and the heirs of their bodies lawfully begotten and to be begotten, as tenants in common, and not as joint tenants ; and, for want of such issue, to my own right heirs for ever” (d).

“ I devise, &c., to the use of all and every the child and children of my late brother *John Hey*, deceased, which shall be living at the time of my decease ; To have and to

(a) See also *Doe v. Burville*, 2 East, 47, note (d) ; and *Mogg v. Mogg*, 1 Mer. 654. (c) *Wright v. Holford*, Cowp. 31.

(d) *Phipard v. Mansfield*, Cowp.

(b) *Anonymous*, 3 Dyer, 303 b. 797.

hold the same, if more than one child, to them and their heirs, share and share alike, as tenants in common, and not as joint tenants. And in case all and every of the said children of my said brother shall happen to die in my life-time, or after my death, without issue, then I hereby give and devise all and singular my said real estate to my right heirs" (a).

"I devise, &c., to all and every the daughter and daughters of the body of my daughter *Martha*, and the heirs male of the body of such daughter or daughters, equally between them, if more than one, as tenants in common, and not as joint tenants; and for and in default of such issue, I give and devise all my said premises unto my right heirs for ever" (b).

"I give and devise all and every the said premises to all and every the younger children of the said *Mary Foxon*, begotten or to be begotten, if more than one, equally to be divided amongst them, and to the heirs of their respective body and bodies; to hold as tenants in common, and not as joint tenants; and if the said *Mary Foxon* shall have only one child, then to such only child, and to the heirs of his or her body lawfully issuing; and, for want of such issue, I give and devise the said premises to, &c." (c).

"And in default of such issue, I give the said moiety of the same manors and premises to my three daughters, and to the heirs of their bodies respectively, as tenants in common; and, in default of such issue, I give the same to my own right heirs for ever" (d).

Cross-remainders have been adjudged not to be implied in the following instances:—

"I devise, &c., to my grandson *Richard Holden*, and to *Elizabeth Holden* my grand-daughter, equally to be

(a) *Bradford v. Foley*, Doug. 63.

(c) *Watson v. Foxon*, 2 East,

(b) *Atherton v. Pye*, 4 T. R. 36.

710.

(d) *Doe v. Webb*, 1 Taunt. 234.

divided, and to the heirs of their respective bodies ; and, for default of such issue, to my grand-daughter *Ann Holden* and her heirs" (a).

" I devise, &c., to my wife *Margaret Owen*, for her life ; and, after her decease, to my son and daughter, *John* and *Margaret Owen*, to be equally divided between them, and the several and respective issues of their bodies, and for want of such issue, to *Margaret Owen*, my wife, in fee" (b).

" I leave the *Withy Stakes'* farm to my two sons *John Cooper* and *George Cooper*, equally between them, share and share alike, and all my household goods and my whole stock of cattle, and husbandry-ware of all kinds whatsoever, with all my bonds, bills, and book-debts, and cash, and personal property, paying all my debts, funeral expenses, and legacies hereinafter named ; and I entail the *Withy Stakes'* farm on the male heirs of *John Cooper* and *George Cooper*, being born in wedlock" (c).

There appears formerly to have been a distinction between the implication of cross-remainders between two persons only, and between more than two. The implication might be between two persons only, but not between more than two (d). But this doctrine is exploded. " It has been truly said," observed Sir *James Mansfield*, in *Doe v. Webb*, " that the ancient doctrine on this subject has been broken in upon ; but it is wonderful how it ever became established" (e). And to the same effect, Mr. Justice *Chambre* : " I wonder, as my lord does, how the old doctrine ever became established. The oldest case is

(a) *Comber v. Hill*, Stra. 969.

(c) *Cooper v. Jones*, 3 Barn. &

(b) *Davenport v. Oldis*, 1 Atk.

A. 425.

579 ; see *Cowp.* 799. 2 East,

(d) *Gilbert v. Witty*, Cro. Jac.

41. 1 Taunt. 238, 239. 3 Barn.

655 ; see 1 Taunt. 236.

& A. 427.

(e) 1 Taunt. 237.

that in *Dyer*, 303 b, and there no difficulty was found in giving cross-remainders by implication among five" (a).

A distinction, however, seems, at this day, to be acknowledged between the *presumption* of cross-remainders between two persons only, and between more than two (b). Lord *Kenyon* has subscribed to this doctrine, in the words of Lord *Mansfield*: "Where cross-remainders are to be raised by implication between two and no more, the presumption is in favour of cross-remainders; where they are to be raised between more than two, the presumption is against them; but that presumption may be answered by circumstances of plain and manifest intention either way" (c). Notwithstanding such high authority, it may, perhaps, be permitted to doubt the soundness of the distinction adopted. A different presumption on the same words (the distinction it is apprehended amounts to this) appears to approach too near to *conjecture*, to be admissible in the exposition of a will.

(a) 1 Taunt. 239.

3 Barn. & A. 429.

(b) 4 T. R. 713. 2 East, 40.

(c) 2 East, 40.



CHAPTER X.

THE SAME WORD MAY BE ACCEPTED IN DIFFERENT SENSES.

IF a testator includes different kinds of property in a devise, the same words of it may be accepted to have different meanings, and, referred to each kind of property, to have the particular meaning applicable to it. This latitude of interpretation was permitted in *Forth v. Chapman* (a). In this case, there was a devise of freehold and leasehold estates to *William Gore*, “and if either he or *Walter Gore* should depart this life, and leave no issue of their respective bodies,” the testator devised the premises over. Lord Chancellor *Parker*, in giving judgment, observed, “what seemed very material, that by this will, the devise carried a freehold as well as a leasehold estate to *William Gore*, and if he or *Walter* died leaving no issue, then to the children of his brother and sister; in which case it was more difficult to conceive how the same words, in the same will, at the same time, should be taken in two different senses. As to the freehold, the construction should be, if *William* or *Walter* died without issue *generally*, by which there might be, *at any time*, a failure of issue; and, with respect to the leasehold, that the same words should be intended to signify their dying without leaving issue *at their death*. However, it might be reasonable enough to take the same words, as to the different estates, in different senses, and as if repeated in several clauses, viz., ‘I devise to *A.* my freehold land; and, if *A.* die without leaving issue, then to *B.*: and I devise my leasehold to *A.*, and, if

(a) 1 P. W. 663.

A. die without leaving issue, then to B.:’ in which case, the different clauses would have the different constructions mentioned to make both the devises good; and it was reasonable it should be so, *ut res magis valeat quam pereat*” (a).

A like distributive construction has, on the authority of *Forth v. Chapman*, been admitted in the cases in the margin (b).

(a) 1 P. W. 667.

(b) *Harris v. Bishop of Lincoln*,
2 P. W. 140. *Hope v. Taylor*, 1
Burr. 268. *Southby v. Stone-*
house, 2 Ves. 611. *Daintry v.*

Daintry, 6 T. R. 307. *Crooke*
v. De Vandes, 9 Ves. 197. *Elton*
v. Eason, 19 Ves. 73. *Kinch v.*
Ward, 2 Sim. & Stu. 409.



CHAPTER XI.

THE INTENTION IS TO BE COLLECTED FROM THE WHOLE WILL.

SECTION I.

THE end proposed in interpreting a will is, to fulfil the testator's intention. It is, therefore, quite immaterial in what part of the will the intention is found. The words are the means to ascertain it; and however they may be scattered, if they explain the intention, they are to be collected and put together, that the particular devise may have the effect intended. Few testators, perhaps, range their ideas compactly enough to express their meaning at once, without explaining their own words. It would, for this reason, evidently in many cases prejudice the intention, if the law collected the sense of one limitation, or one part only, of the will, and looked no farther; and, therefore, with reason, all the words in the will, wherever they are, are subservient to make out the intention of any part of it (a).

Of Introductory Words.

A TESTATOR frequently begins his will with enumerating his property, and declaring his intention to dispose of it. In these cases, the introductory words will not, of themselves, form a devise, but are accepted as explanatory of the will which follows them. "Introductory words," Lord *Mansfield* has said, "cannot vary the construction

(a) Willes, 3. 3 Burr. 1622, 1625. Forrest. 160. Doe v. Allcock, 1 B. & A. 137.

of a devise, so as to enlarge the estate of a devisee, unless there are words in the devise itself sufficient to carry the degree of interest contended for. But wherever they assist to shew the intention of the testator, the Courts have laid hold of them, as they do of *every other* circumstance in a will, which may help to guide their judgment to the right and true construction of it" (a). "Though the introduction of a will, declaring that a man means to make a disposition of all his worldly estate, is a strong circumstance, connected with other words, to explain the testator's intention of enlarging a particular estate, or of passing a fee, where he has used no words of limitation, it will not do *alone*. And all the cases cited in the argument [Forrester, 157. *Ibbetson v. Beckwith*; 1 Wils. 133; 3 Wils. 143; *Hogan v. Jackson*, Cowp. 299], to shew that the introductory words in this case would *alone* be sufficient, fall short of the mark; because they contained other words clearly manifesting the intention of the testator to pass a fee" (b).

A testator began his will in the words:

"As to my worldly substance" (c);

"As touching my worldly estate wherewith it hath pleased God to bless me" (d);

"As touching such worldly estate wherewith it hath pleased God to bless me" (e);

"As touching the disposition of all such worldly estate as it hath pleased God to bestow on me" (f);

"As to all such worldly estate as God has endued me with" (g);

(a) Cowp. 306.

(b) *Ibid.* 356.

(c) *Hogan v. Jackson*, Cowp. 299.

(d) *Ibbetson v. Beckwith*, Forrester, 157.

(e) *Loveacres v. Blight*, Cowp.

352. *Roe v. Bolton*, cited Doug.

732. *Goodright v. Barron*, 11 East, 220.

(f) *Wright v. Russell*, cited Cowp. 661.

(g) *Denn v. Gaskin*, Cowp. 657.

“For those worldly goods and estates wherewith it has pleased Almighty God to bless me” (a);

“As for my worldly affairs and estate” (b);

“As touching all such temporal estate of lands, goods, and chattels, as God hath endowed me with” (c);

“As to my estate and effects, both real and personal, I give and dispose thereof in manner following” (d);

“As touching such worldly and personal estate wherewith it has pleased God to bless me” (e);

“As to the worldly estate with which it has pleased God to bless me” (f);

“I give and bequeath all that I shall die possessed of, real and personal, of what nature and kind soever, after my just debts are paid” (g);

In all these cases it was admitted, that the introductory words in a will may be accepted as explanatory of the will which follows; *juncta juvant* (h); but that of themselves they are not evidence sufficient of an intention to convey to a devisee the whole estate of the testator.

SECTION II.

Of Context.

THE *context* of a devise is a farther means to explain the intention. Often, by the context,

A limitation for *life* is explained to be a devise in *tail*, or in *fee*;

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| (a) <i>Right v. Sidebotham</i> , Doug. 730. | 610. <i>Doe v. Allen</i> , 8 T. R. 497. |
| (b) <i>Frogmorton v. Holyday</i> , 3 Burr. 1618; see 1625. | (e) <i>Doe v. Wright</i> , 8 T. R. 64. |
| (c) <i>Goodright v. Stocker</i> , 5 T. B. 13. | (f) <i>Roe v. Vernon</i> , 5 East, 51. |
| (d) <i>Doe v. Buckner</i> , 6 T. R. | (g) <i>Pitman v. Stevens</i> , 15 East, 505. |
| | (h) 11 East, 223. |

A limitation in *fee*, to be a devise in *tail*;

A limitation in *fee*, to be determinable in favour of an executory devise;

A limitation in *joint-tenancy*, to be a devise in *common*.

1. *A limitation for life explained to be in tail.*

A LIMITATION for *life* has been explained, and judicially determined, to be a devise in *tail*, in devises in the words:

"I will the house, that *J. V.* dwelleth in, to my three brothers, among them; provided always, that the house be not sold, but go unto the next of the name and blood that are males, if it may be" (*a*).

"I devise, &c., to *Margaret*, my wife, for life; and after her decease [remainder to testator's sons *William* and *Samuel*, in tail male]. If no issue male of *Samuel*, then my son *Thomas* to have the house; if *Thomas* marry, having a male issue of his body, lawfully begotten, then his son to have the house after his decease; if he [*Thomas*] have no issue male," [remainders over] (*b*).

"Item, I give to my wife *Joan* all my houses and free lands for her life; and after her death to my three daughters, equally to be divided, namely, to *Joan*, *Avice*, and *Alice*; and if any of them die before the other, then the others to be her heirs, equally to be divided; and if they all die without issue," [remainder over] (*c*).

"I devise, &c., to *A.* my eldest son; and if *A.* dies without heirs male, then to *B.* my other son" (*d*).

"I devise, &c., to *A.* for life, and, if he dies without issue," [remainder over] (*e*).

(*a*) Chapman's case, Dyer, 333
b.
(*b*) Soday's case, 9 Co. 128.
(*c*) King v. Rumball, Cro. Jac.
448.

(*d*) Blaxton v. Stone, 3 Mod. 123.
(*e*) Robinson's case, cited 1
Vent. 230. But see 1 P. W. 57,
605. Ives v. Legge, 3 T. R. 488,
note (*a*).

"I devise, &c., to *A.*, and, if he dies not having a son, then to remain to my heirs" (a).

"I devise to my wife *Elizabeth* all my lands, not settled in jointure; and if it shall happen that my said wife *Elizabeth* shall have no son nor daughter by me begotten of the body of the said *Elizabeth*, and for want of such issue, then the said premises to return to my brother *John Wyld*, if he shall be then living, and his heirs for ever" (b).

"I devise to *John Wedgeborough*, my house in the brook, with the outbuildings; to *Charles Taylor*, *Robert Taylor*, and *William Taylor*, twenty-nine acres of arable and meadow land, bought of *B.*; to *William Taylor* my house on the green, with the ground and outhouses thereto belonging; and if either of the persons before named die without issue lawfully begotten, then the said legacy shall be divided equally between them that are left alive" (c).

"I give and bequeath all my copyhold lands lying in *Hazlewood* to my nephew *Isaac Slater*; but if the afore-said *Isaac Slaters* should die without male heir, then my will is, that my nephew *John Slater* shall enter upon and enjoy the said copyhold lands, his heirs or assigns for ever" (d).

"I bequeath to *Francis*, my son, my houses in *London*, after the death of my wife; and if my three daughters, or either of them, do over live their mother, and *Francis* their brother, and his heirs, then they to enjoy the same houses for term of their lives" (e).

"I leave and bequeath to my dear husband all the profits and revenues of my estates at *Buttermee*, in *Wiltshire*; as also all the profits and revenues of my estate at *C*—, in *Oxfordshire*, both for his natural life; and after the death of my dear husband, I give and bequeath my said

(a) *Bifield's case*, cited 1 Vent. 231.

(d) *Denn v. Slater*, 5 T. R. 335.

(b) *Wyld v. Lewis*, 1 Atk. 432.

(e) *Webb v. Hearing*, Cro. Jac.

415.

(c) *Hope v. Taylor*, 1 Burr. 268.

estates to my dear children, if I should leave any to survive me; but in case I should leave no such child or children, nor the issue of such child or children, then I give and bequeath the said estates to *J. Hutton*, making him hereby sole heir of this my last will and testament, in default of issue left by me" (a).

"I leave the *Withy Stakes'* farm, to my two sons, *John Cooper* and *George Cooper*, equally between them, share and share alike; and all my household goods, and my whole stock of cattle, and husbandry-ware of all kinds whatsoever, with all my bonds, bills, and book debts, and cash and personal property, paying all my debts, funeral expenses, and legacies hereinafter named; and I entail the *Withy Stakes'* farm on the male heirs of *John Cooper* and *George Cooper*, being born in wedlock" (b).

2. A limitation for life explained to be in fee.

As a general position, a limitation for *life* may be explained to be a devise in *fee*, by *any* words of explanation in the particular will (c).

A devise without any words of limitation (d) (which, by implication, is a devise for life), may be explained to be a devise in fee; 1st, by the creation of a trust which cannot be performed, unless the trustee has the fee; 2dly, by the tendency of farther clauses in the will to make the devise hurtful to the devisee, unless he takes the fee-simple.

1st. The authorities in the margin (e) are instances, in

(a) *Southby v. Stonehouse*, 2 Ves. 611. 352. *Doe v. Clayton*, 8 East, 141. *Toovey v. Bassett*, 10 East, 460.

(b) *Cooper v. Jones*, 3 Barn. & A. 425.

(d) See Cowp. 841.

(c) *Greeve v. Dewel*, Cro. Jac. 599. *Greene v. Armsteed*, S. C. Hob. 65. *Anon.* 9. Mod. 92. *Gibson v. Lord Montfort*, 1 Ves. 485. *Amb.* 93. *Doe v. Woodhouse*, 4 T. R. 89.

(e) *Shaw v. Way*, 8 Mod. 253. *Oates v. Cooke*, 3 Burr. 1684. *Frogmorton v. Holyday*, 3 Burr. 1618. *Loveacres v. Blight*, Cowp.

which, on a devise without any words of limitation, a trustee has been held to take the fee-simple.

2dly. A devise without any words of limitation may be hurtful to the devisee, unless he takes the fee-simple, if, excepting by means of the unanticipated yearly rents and profits of the land, it subjects him to pay either a *sum of money*, or *debts*, or *legacies*, or an *annuity*. This is evident, since after the devisee has advanced his money, for either of these purposes, he may die before he is able to repay himself out of the estate. The law, then, supposing, in all cases, a devise is intended to be beneficial (*a*) rather than hurtful to the devisee, accepts the words, of a prejudicial tendency (*b*) in the will, to explain the limitation for life to be, by the testator's intention, a devise in fee. In the instance of the *annuity*, there is the farther evidence that the testator intends to give the fee-simple; that (admitting the annuity is intended, expressly or by implication, to be for life) supposing the devisee to have a life estate only, and to die before the annuitant, the annuity will cease in the annuitant's life-time (*c*).

A devisee for life by implication, subjected to pay a *sum of money*, has taken a fee-simple on devises in the words (*d*):

"I devise, &c. to my wife for life, and after her decease, to *John*, my eldest son, paying 40s. to each of his brothers and to his sister, within two years after the death of my wife" (*e*).

"I devise, &c. to *A.* for life, and after her death to *B.*, paying 45s. to *C.*" (*f*).

(*a*) 6 Co. 16. 2 Mod. 26. Cowp. 841. Willes, 141, 651.

(*b*) See 2 Mod. 26. Willes, 141, and note (*d*).

(*c*) 5 T. R. 14, 295.

(*d*) See also *Moore v. Price*, 3 Keb. 49. *Spicer v. Spicer*, Cro.

Jac. 527. *Greeve v. Dewel*, *ibid*, 599. Hob. 65.

(*e*) *Wellock v. Hammond*, Cro. Eliz. 204.

(*f*) *Collier's case*, 6 Co. 16. Cro. Eliz. 379.

A devisee for life by implication, subjected to pay the *debts* of the testator, has taken a fee-simple on devises in the words :

“ I devise to my brother *Richard* all my lands, tenements, and hereditaments, and all my personal estate, and whatever else I have in the world, and make him executor, desiring him to pay my debts and legacies ” (a).

“ I give and bequeath my freehold house, with the appurtenances, &c., and all the furniture thereto belonging, to *Elizabeth Gibson*, whom I make executrix of this my last will, she paying all my just debts, and funeral expenses, and the legacies before mentioned, twelve months after my death. I likewise leave to the said *E. Gibson* all the rest and residue of my personal estate ” (b).

“ All the rest I have in the world, both houses, lands, goods and chattels, stock-in-trade, and all other things that belong for may belong to me, I give to my present wife, *Joan Pascoe*, my executrix, so that she shall sell my stock-in-trade and household goods ; and if these will not pay the debts, she shall sell next the house of fee in *Penzance* [not specifically devised], and not *Prospednick* ; so that my executrix shall pay, in good time, all lawful debts that shall appear ” (c).

“ I give and bequeath to *George Snelling* and *Sarah* his wife all that my messuage or tenement, farm, lands, and premises, situate in *Bramley* aforesaid : also all that my messuage or tenement, garden, and premises, situate in *Wonersh* aforesaid, and now in my occupation : also all and singular my goods, chattels, rights, credits, ready money, and personal estate, of what nature and kind soever, as I shall die seised and possessed of, interested in, or entitled to, after having thereout first paid and dis-

(a) *Ackland v. Ackland*, 2 Vern. 687.

(c) *Goodtitle v. Maddern*, 4 East, 496.

(b) *Doe v. Holmes*, 8 T. R. 1.

charged all my just debts and funeral expenses : also subject to the payment thereof all the aforesaid legacies. And I appoint the said *George Snelling* to be sole executor of this my last will and testament, whom I charge with the payment of all my just debts, legacies, and funeral expenses " (a).

A devisee for life by implication, subjected to pay legacies, has taken a fee-simple on devises in the words (b) :

" I devise, &c., to A.; and bequeath 5*l.* to B.; and I direct A. to pay it, but give him two years time to pay it " (c).

" All the rest, residue, and remainder of my messuages, lands, tenements, hereditaments, goods, chattels, and personal estate whatsoever, my legacies and funeral expenses being thereof paid, I give, devise, and bequeath to my sister *Jane Dewdney*; and do hereby appoint her sole executrix and residuary legatee of this my will " (d).

A devisee for life by implication, subjected to pay an annuity, has taken a fee-simple on devises in the words (e) :

" I devise, &c., to *James* and *Francis*, my sons, and will that they shall pay annually to *William Hunt*, my eldest son, and his heirs, 3*l.*" (f).

" I devise, &c. to *Roger Wittenbury* and *John Wittenbury*, and they to pay yearly to the *Bachelors' Company of Merchant Taylors*, 6*l.* 10*s.*; and, if they or their successors deny the payment of the said sum, then it shall be lawful to the wardens of the said company to enter and discharge them for ever " (g).

(a) Doe v. Snelling, 5 East, 87.

(b) See also *Freak v. Lea*, 2 Lev. 249. *Ackland v. Ackland*, 2 Vern.

687. Doe v. Snelling, 5 East, 87.

(c) *Reeves v. Gower*, 11 Mod. 208.

(d) Doe v. Richards, 3 T. R. 356.

(e) See also *Jenkins v. Jenkins*, Willes, 650. Doe v. Woodhouse, 4 T. R. 89.

(f) *Shailard v. Baker*, Cro. Eliz. 744.

(g) *Webb v. Hearing*, Cro. Jac. 415.

"I devise, &c., to *Richard*, my son, paying to *Thomas*, 3*l.* a year" (a).

"I devise, &c., to my son *Robert*; which houses I give to my son on this condition, that he pay unto his two sisters 5*l.* a year, the first payment to begin at the first of the four most usual feasts that shall next happen after my death, so as the said feast be a month after my death" (b).

"I devise, &c., to the poor of *Sutton* 40*s.*, to be distributed by my executrix, with four coats, four hats, on every 21st of November, for ever; and all my lands, tenements, and hereditaments, and all my personal estate, to *Margaret*, my executrix" (c).

"I devise, &c., to *A.*, conditionally, that he shall allow to my son *Nicholas*, meat, drink, apparel, washing and lodging during his natural life" (d).

"I give and bequeath my two copyhold tenements, now in the occupation of *Edward Twogood* and *Elizabeth Savill*, being in *Castle-Heddingham*, to *Surah Boreham*, the daughter of *Elizabeth Boreham*, widow; she paying thereout 40*s.* a year to her sister *Elizabeth Boreham*" (e).

"I give to *Mary Ramsay*, the sum of 20*s.*, to be paid by two equal payments after my decease, for and during her natural life, to be paid by my executor after-named. I devise to my kinsman *Thomas Allin* all my two yardlands, with my house and homestead with the appurtenances. And all the residue and remainder of my goods, chattels, debts, mortgages, leases and personal estate, I give to the said *Thomas Allin*, he paying my debts, legacies and funeral expenses" (f).

(a) *Spicer v. Spicer*, Cro. Jac. 527.

(b) *Reed v. Hatton*, 2 Mod. 25.

(c) *Smith v. Tindal*, 11 Mod. 102. 2 Salk. 685.

(d) *Lee v. Stephens*, 2 Show. 49.

(e) *Baddeley v. Leppingwell*, 3

Burr. 1533.

(f) *Goodright v. Allin*, 2 Bl. Rep. 1041.

"I devise to my grandson *John Baker*, my higher dwelling-house, lying near the market-place, paying yearly and every year out of the said higher dwelling-house the sum of 15s. unto my grand-daughter *A. Halstaff*"(a).

"I devise, &c., to my sister *Lois Andrew*, and her assigns, during the term of her natural life; and, from and after her decease, I give and devise the same unto *E. Southouse*, grand-nephew of my late husband, charged and chargeable, nevertheless, with the payment of one annuity or yearly rent-charge of 20l. *per annum* to *James Tooth*, and his assigns, for and during the term of his natural life, to commence from and immediately after my decease, and payable quarterly by even and equal portions"(b).

When a devise without any words of limitation is construed to be a devise in fee, there is evidence in the will that the testator *intended* to devise the whole *fee*. But if, in any case, this intention does not appear, the devisee will not be entitled to it.

Four instances, in particular, may be here mentioned, in which a devisee may not be entitled to the fee-simple:—

1. If the devise is without any words of limitation, in trust, but the trust can be performed with a less estate than the fee, the trustee will not be entitled to the fee-simple (c). In *Doe v. Simpson*, a person devised in the words: "I give and devise to Mr. *H. Hyatt*, my cousin *Fitz-Ferrand*, and Mr. *Syddall*, and the survivor of them, and the executors and administrators of such survivor, all those my messuages, lands, &c., whatsoever, in *London*, *Kensington*, and in the parish of *St. Matthew, Bethnal Green, Middlesex*, together with all arrears of rent due from the

(a) *Goodright v. Stocker*, 5 T. R. 13.

(b) *Andrew v. Southouse*, 5 T. R. 292.

(c) *Doe v. Simpson*, 5 East, 162. *Hawker v. Hawker*, 3 Barn. & A. 537. See *Glover v. Monckton*, 3 Bingh. 13.

tenants of the said estates, and the bond and judgment I have from my tenant *John Sugar*, for arrears due ; in trust, that they, out of the rents and profits of the said estates and arrears due, shall pay one annuity of 50*l.* to my sister *Mrs. Holme*, for her life, by half-yearly payments, from the time of my decease ; and also to pay one other annuity of 50*l.* to my sister *Mrs. Dickinson*, for her life, by half-yearly payments, for her sole and separate use, &c. And from and after payment of the said annuities, then in trust, out of the said rest and residue of the said rents and profits, to pay to my brother *Thomas White*, and my nephew, his son, *Charles White*, and *Peter Holme*, and the survivor of them, and the executors, &c., of such survivor, the sum of 800*l.*, to be by them paid and applied to the sole use and benefit of the said children of my said brother *William*, in such manner and proportion, and to and for such uses, &c., as they shall think best. And from and after payment of the said annuities, and the said sum of 800*l.*, I give and devise my said estates in *London* and *Middlesex*, last mentioned, to my brother *William* for life, remainder to his eldest son *William* for life, remainder to his second son *Samuel* for life, remainder to his third son *Charles* for life, remainder to his youngest son *John* for life, remainder to my brother *Thomas White* for life, and after his decease to his son, my nephew, *Charles White* [the lessor of the plaintiff], and his heirs male ; and for want of such issue, to my right heirs for ever." Lord *Ellenborough*, who delivered the judgment, explained the reasons of it, partly, as follows : " Of the several cases cited by Mr. *Wood*, two of them, which have the most immediate bearing on this question, viz. *Shapland v. Smith* (1 Bro. Chan. Rep. 75) and *Silvester v. Wilson* (2 T. R. 444), appear to establish, that if an estate for life be left to trustees and their heirs, in trust to pay the

profits, or an annuity out of *them*, to another for life ; and after the death of the annuitant, or person entitled to the profits, if the estate be given to or to the use of another ; in such case, the trustees take only an estate for the life of the *cestui que trust*, or the annuitant, and the remainder over is executed by the statute ; and the authorities referred to, viz., Co. Litt. 42 a ; and *Sir William Cordell's* case, 8 Co. 96, establish the proposition, That if an estate be devised to executors generally, for payment of debts, they will take only a chattel interest ; from whence it appears to be a fair inference, that, where the purposes of a trust can be answered by a less estate than a fee-simple, a greater interest than is sufficient to answer such purpose shall not pass to them ; but that the uses in remainder, limited on such lesser estate so given to them, shall be executed by the statute. I have not met with any case in which the trustees have been holden to take any other interest than either a chattel, an estate for life, or in fee ; but I see no reason why they may not, in order to answer the purposes of the trust, take an estate by implication for the lives of the annuitants, with a term of years in remainder, sufficient for the purpose of raising, out of the rents and profits, the sum of 800*l.*, directed to be paid out of the same. Such an estate might certainly be limited by express terms in a deed or will ; and the circumstance of the bequest to the trustees, and the personal representatives of the survivor of them, of the bond and judgment given to the testator by a tenant for arrears due (and which is certainly a matter merely of a personal nature), goes strongly in confirmation of this construction ; for if the trustees were meant to take a fee, then the legal estate in the land devised, and the interest in this bond and judgment, would go to different classes of representatives of the same surviving trustees ; which apparent inconsistency is avoided, if the trustees

take the same description of interest (i. e. a chattel interest in the land), as they respectively must do in the bond and judgment. On the whole we are of opinion, that the trustees took an estate by implication for the lives of the annuitants, with a term of years in remainder, for the purpose of raising the sum of 800*l.*; and that after those trusts were (as they appear in evidence to have been) satisfied, the several limitations for life and in tail took effect as legal limitations"(a).

2. Although the devisee is subjected to pay a sum of money, a debt, a legacy, or an annuity; yet, it appears, if the devise to him is *expressly* for *life* (b), or in *tail* (c), he will not be entitled to the fee-simple (d). "As to the argument," said Mr. Justice *Bayley*, in *Doe v. Wrighte*, "that the charges in the different codicils would of themselves give an estate in fee to *G. Sharp*, the will contains only an express devise of an estate for life to *G. Sharp*. Now I can find no case where, after such an *express* devise, it has been held that a charge of this sort will extend the estate to an estate in fee. All the cases are where the words of the devise are *general*; and there is not one of which I am aware, in which such an effect has been given to a personal charge, after an *express* devise of an estate for life" (e). To the same effect, Lord *Kenyon*, in *Denn v. Slater*: "With regard to the other question, the law on this subject is very accurately stated by Lord *Mansfield*, in the case in *Cowper* (f). Where an estate is given *generally*, without adding words which would create a fee or an estate-tail, and it is charged with the payment of annuities, the devisee takes a fee: but that is not the

(a) 5 East, 162.

(b) *Doe v. Wrighte*, 2 Barn. & A. 710.

(c) *Doe v. Fyldes*, Cowp. 833.
Denn v. Slater, 5 T. R. 335.

(d) See Cowp. 841. *Brice v. Smith*, Willes, 1. *Denn v. Shenton*, Cowp. 410.

(e) 2 Barn. & A. 722.

(f) 841.

case where an estate-tail is given to the devisee. In this case, the devisor's wife, to whom the annuity was given, had a power of entry in case of non-payment of her annuity. And the legacies given were to be paid at a remote period, before which time the devisee had the power of acquiring the fee by suffering a recovery" (a).

3. If the devise is without any words of limitation, but the devisee, although subjected to pay a sum of money, a debt, a legacy, or an annuity, cannot be a loser by the devise, as he is to pay the money out of the yearly rents and profits, unanticipated, of the estate, he will not be entitled to the fee-simple (b). A person seised of a remainder in fee after the death of his father, tenant for life, devised in the words : " I devise to D., my wife, the land I have or may have in reversion after the decease of my father, yielding and paying therefore yearly, during her life-natural, to the right heirs of my said father, 40s." ; and, by the opinion of the Court, no other estate passed by this devise but for term of life of the wife (c). A person, bound in an obligation that 40*l.* should be paid annually to his wife during her life, devised all his lands amongst his sons. Particular land he devised to his sons, *Michael* and *Henry*, and added this clause : " Item, all the houses and lands which I have given between my sons is to this purpose, that they all shall bear part and part like, going out of all my houses and lands, towards the payment of my wife's 40*l. per annum* during her life, which I am bound to pay." All the Court resolved, that it was but an estate for life that passed by the devise to *Michael* and *Henry*. " It is not devised," it was said, " paying such a sum, which is a sum in gross, as it is cited in *Willock v. Hammond*, but that every one shall pay out of his part towards the payment of the

(a) 5 T. R. 337.

land, 2 Vern. 106.

(b) 6 Co. 16. *Hawker v. Buck-*

(c) *Ager v. Pool*, Dyer, 371 b.

40*l.* per annum to his wife; which is *quasi* an annual rent out of the profits of the land, and no sum in gross, and therefore no fee given" (a).

4. If a sum of money, a debt, or a legacy, is *first* to be paid out of the estate, and, after payment, there is a devise without any words of limitation, the devisee, who clearly can be no loser by the devise, will not be entitled to the fee-simple. In these cases, the land is made the fund for the particular payment, but it is not given to the devisee to pay the money with. The land is devised to him *after* the payment of it; the charge in the will taking precedence of the devise (b).

The law has been so stated on devises in the words:

"I devise, &c., all my lands and goods, after my debts and legacies paid, to *R. Toby*, and *Mary*, my children [the former being the testator's heir at law], equally to be divided between them" (c).

"All my lands, tenements, and messuages whatsoever, after debts and legacies paid, and funeral expenses are discharged, I give to my brother-in-law, *James Merson*" (d).

"All the rest of my lands, tenements, and hereditaments, either freehold or copyhold, whatsoever and wheresoever, and also all my goods, chattels, and personal estate, of what nature or kind soever, after payment of my just debts and funeral expenses, I give, devise, and bequeath unto my wife, *Sissily Carr*, and I do hereby appoint her sole executrix of this my will" (e).

It was said, on the last devise, by Lord *Kenyon*, "Where a devisee is directed to pay an annual rent-charge, or a solid sum, to another person, out of the estate devised, it has been properly decided that the devisee should take a fee,

(a) *Ansley v. Chapman*, Cro. Car. 157. Sir W. Jones, 211, cited Willes, 653. (d) *Merson v. Blackmore*, 2 Atk. 341.

(b) See 3 M. & S. 523.

(e) *Denn v. Mellor*, 5 T. R. 558.

(c) *Dickins v. Marshall*, Cro.

But see *Denn v. Moor*, 1 Bos. & P. 558; and 8 T. R. 503.

Eliz. 330.

because he might be a loser, unless the estate in his hands were, at all events, sufficient to enable him to bear those charges. Where a sum of money is given, it may be payable before the rents may become due; and, where an annual charge is made on the estate, it may continue beyond the life of the devisee, and therefore it is necessary, in both those cases, that the devisee should have a permanent fund. This case has been compared to that of *Doe v. Richards* (a); but there the words were, 'my legacies and funeral expenses being *thereout* paid,' which imported that those sums were to be paid by the devisee out of the interest given to her; and if she had died immediately after the deviser, and had only taken a life estate, the fund out of which she was to bear those charges might have failed; we were, therefore, compelled to make that decision, and I am now perfectly satisfied with it. But, in this case, the words of the will are, 'after payment of my just debts and funeral expenses.' Now, supposing the deviser had, in the beginning of the will, charged his debts and funeral expenses on his real estate, and had then, after a series of limitations, devised to his wife in the words now used, it could not have been contended that such a charge on the real estate would have passed the fee to his wife; and if not, the place, in which the same words are introduced, cannot vary the question. I admit that the real estate is charged with the payment of debts and funeral expenses, if the personalty be insufficient for that purpose; but there are no words charging the estate in the hands of the wife with the payment of those debts. This, therefore, essentially differs the present case from that of *Doe v. Richards*; for there the debts were to be paid by the devisee, and were a charge on the estate in his hands, whereas here the debts are no charge on the devisee" (b).

(a) 3 T. R. 356.

(b) 5 T. R. 562.

Farther devises of the same kind are :—

“ First, my will is, that all my debts and funeral expenses be justly paid off and discharged out of my personal estate; and, if the same shall fall short, I do hereby charge my real estate with the payment of the same. I do hereby give and devise all my messuages, lands, tenements, and hereditaments whatsoever, situate, lying, and being in the several parishes of *Skeiviog*, *Kilkew*, and *Mold*, unto *William Allen*, of *Skeiviog*, son of *Thomas Allen*, of *Skeiviog* aforesaid, deceased” (a).

“ I devise, &c., to my grandson, *W. Langham*, with all my stock, book-debts, household goods, and furniture whatsoever, thereto belonging, after payment of my debts, legacies, &c.” (b).

“ I devise, &c., to my two nieces, *Mary Hender Bant* and *Elizabeth Bant*, except 20*l.*, to be paid out of *Elizabeth's* part of the lands, to *M. H. Bant*.”—By Lord *Ellenborough* on this will : “ The main argument has been on the provision, ‘ except 20*l.* to be paid out of *Elizabeth's* part of the lands,’ which, it has been contended, is a charge to be paid out of the lands, and therefore a fee shall pass; and I agree, if it be a charge to be paid out of the lands in the hands of the devisee, the argument is good. But it appears, I think, from *Denn v. Moor* (c), as well as from the principle on which *Doe v. Richards* was decided, that in this case a fee does not pass, because this is not a charge upon the estate in the hands of the devisee. The devise is of the lands to her two nieces, *M.* and *E.*, except 20*l.* to be paid out of *E.'s* part of the lands to *M.*; as if the testatrix had said, I give the lands to my nieces equally, except in this respect, that before *E.* shall take any beneficial interest in her part, *M.* shall have out of it 20*l.*; or, in

(a) *Doe v. Allen*, 8 T. R. 497. S. 516.

(b) *Doe v. Ramsbotham*, 3 M. & (c) 1 B. & P. 558.

other words, *E.* shall have her moiety, minus 20*l.* It is, therefore, a charge antecedent to the devise, not a devise on condition of paying, as in *Collier's* case; it is collateral to the interest of the devisee. "*Except,*" indicates that *M.* shall take the 20*l.* independently of any interest in *E.*" Mr. Justice *Le Blanc* considered the words "except 20*l.* to be paid out of *Elizabeth's* part of the lands to *M.,*" as tantamount to "after payment of 20*l.* to *M.*" (*a*).

3. A limitation in fee explained to be in tail.

A LIMITATION in *fee* has been explained to be a devise in *tail* in the following devise:—

"I devise, &c., to my wife for life; and, after her decease, to be equally divided between my four children, *Henry, John, Elizabeth, and Sarah,* and to each of them and their heirs for ever, share and share alike; and in case they shall be minded, and agree among themselves, to sell the said estate, then every one of my said children shall have their equal shares of the monies from thence arising; but if they consent and agree to keep the estate whole together, then and in such case all the rents, issues, and profits thereof, from time to time, as they shall become due and payable, shall be equally paid and divided between my four children, and to the several and respective heirs of them of their bodies lawfully begotten, share and share alike" (*b*).

A LIMITATION in *fee* is often explained to be a devise in *tail*, by a limitation over on the failure, at any time, of the heirs of the body of the devisee in fee.

By an explanation of this kind, a devisee in fee has been held to be entitled to a fee-tail only in the following devises:—

"I devise, &c., to *Richard,* my son, and his heirs for

(*a*) *Roe v. Daw*, 3 M. & S. 518.

(*b*) *Roe v. Avis*, 4 T. R. 605.

ever ; and if *Richard* dies without issue, then the land shall be equally divided amongst my three other sons" (a).

" I devise all those my lands and tenements, lying in the parish of *Cuckfield*, called *Heselands*, to my wife for life ; and, after her decease, it shall remain to *John*, my son, and his heirs ; and, if *John* dies without issue, *Heselands* shall remain to my three daughters in fee" (b).

" I devise all my lands to *John*, my son, and his heirs ; and, if he die without issue, I devise my lands in *Reculver*, to *Matthew*, my nephew, in fee" (c).

" I devise, &c., to my wife for life, and, after her death, to *John*, my eldest son, and to his heirs, on condition that he, as soon as the land shall come to him in possession, shall grant to *Stephen* my grandson, and his heirs, an annual rent of 4*l.* out of the said tenement ; and if the said *John* dies without heirs of his body, the land shall remain to the said *Stephen*, and the heirs of his body" (d).

" I devise, &c., to my three daughters, equally to be divided ; and if any of them die before the other, then the others to be her heirs, equally to be divided ; and if they all die without issue," then over (e).

" I devise, &c., to my wife for life ; and, after her death, all my lands in *Bradmere*, to *Thomas*, my son, and his heirs, for ever ; and my lands in *East-Leak* to *Francis*, my son, and his heirs, for ever. Item, I will that the survivor of them shall be heir to the other, if either of them die without issue" (f).

" I give and devise all that my freehold messuage or tenement, from and after the decease of my wife *Margaret*,

(a) *Soulle v. Gerrard*, Cro. Eliz. 525.

(b) *Tuttesham v. Roberts*, Cro. Jac. 22.

(c) *Browne v. Jerves*, *ibid*, 290.

(d) *Dutton v. Engram*, *ibid*, 427.

(e) *King v. Rumball*, *ibid*, 448.

(f) *Chadock v. Cowley*, *ibid*, 965.

unto *Philip Brice*, my son, and his heirs, for ever. Item, my will and mind is, that in case any of my children, unto whom I have bequeathed any of my real estates, shall die without issue, then I give the estate of him or them so dying unto his or their right heirs, for ever" (a).

"I give and bequeath to my grandson, *Samuel Shenton*, all that my meadow ground, called *Picked Mead*, lying and being in the parish of *Denchworth*, in the county of *Berks.*, to hold unto the said *Samuel Shenton*, and the heirs of his body, lawfully to be begotten, and their heirs, for ever; but in case the said *Samuel Shenton* shall die without leaving issue of his body, then I give and devise the said meadow-ground unto my nephew, *William Geering*, to hold unto the said *William Geering*, and his heirs, for ever" (b).

"I devise, &c., to my daughter and only child, *Mary Fyfield*, on her attaining 21, and to her heirs; and as to that part which has been settled on my wife, I devise the same to my said daughter, after the death of my widow. In case my widow shall die before my daughter attains 21, then I will that both parts of the estate shall go immediately to my daughter and her heirs, for ever; but I will that my wife shall hold and enjoy both parts until my daughter shall attain the age of 21; and in case my daughter shall die without issue, then I empower her to dispose of the whole by will, or any other instrument in writing, attested by three witnesses, as she shall direct, limit, or appoint; and for want of such issue and direction, &c., then the same shall descend, and go to my own right heirs" (c).

"I devise, &c. to my son, *Richard Lemmon*, and my daughter *Elizabeth*, wife of *E. Baldy*, and their heirs for ever;

(a) *Brice v. Smith*, Willes, 1.

(c) *Doe v. Rivers*, 7 T. R. 276.

(b) *Denn v. Shenton*, Cowp. 410.

provided that if my said son and daughter shall both have issue, then both their dividends aforesaid are to go to the issue of their own bodies ; but if but one of them shall have issue, then the premises shall go to that issue, whether it be the child of my son or daughter aforesaid ; but if they both die without issue of their own bodies, then immediately to the right heir at law, and his heirs for ever" (a).

" I give and devise, &c., to *David Ormond*, my eldest son and heir apparent, for life, without impeachment of waste ; remainder to *L. E.*, and his heirs, to preserve contingent remainders ; remainder to the first and other sons of my said eldest son, and their heirs ; and, for want of such issue, to my second son *John Ormond* for life," [remainders over] (b).

" I give and devise unto my son *Joseph*, his heirs and assigns for ever, all that messuage or tenement in *Leeds*, in his own occupation ; but in case my said son *Joseph* shall die without issue, then I give and devise the same messuage unto the child or children with which my wife is now *en-sient*, his or her heirs and assigns for ever" (c)

" Which last-mentioned nine closes I hereby give to the said *John Agar*, and his heirs for ever, upon this condition only, that he shall yearly, by half-yearly payments, at Michaelmas and Lady-day, pay to my daughter, *Elizabeth Agar*, the sum of 12*l.* a year, until she shall attain the age of 21 years ; and, after that age, to pay her 300*l.*, in lieu thereof : and for default of payment of any part so limited and bequeathed to her, she shall enter into the said nine closes, and shall enjoy them all to her and her heirs for ever. And in case my said son and daughter both happen to die without leaving any child or issue, lawfully begotten or to be begotten, then and in such case only, I give and devise

(a) *Doe v. Whichelo*, 8 T. R. 211.

(b) *Lewis v. Waters*, 6 East, 336.

(c) *Doe v. Ellis*, 9 East, 382.

the reversion and inheritance of all my said buildings, lands, and hereditaments whatever, to my cousin *Richard Agar*, and to his right heirs for ever" (a).

"I devise, &c., to my eldest son, *Dansey Richard Dansey*, and his heirs for ever; but if it shall so happen that my eldest son *D. R. Dansey* shall die and leave no issue, then to my son *William Dansey* and his heirs" (b).

A LIMITATION in fee is often explained to be a devise in tail, by a limitation over to a collateral heir of the devisee in fee, on the failure of his heirs.

By an explanation of this kind, a devisee in fee has been held to be entitled to a fee-tail only in the following devises:—

"I bequeath to *Francis*, my son, my houses in *London*, after the death of my wife; and, if my three daughters, or either of them, do overlive their mother, and *Francis* their brother and his heirs, then they to enjoy the same houses for term of their lives."—The Court on this will resolved, that the son had but a fee-tail, "for 'heirs,' in this place, is intended heirs of the body; for the limitation being to his sisters, it is necessarily to be intended, that it was, if he should die without issue of his body; for they are his heirs collateral. And, therefore, there is a difference. Where a devise is to one and his heirs, and if he die without heirs, that it shall remain [to a stranger]; it is void, as 19 Hen. VIII., pl. 9; yet when a devise is to one and his heirs, and, if he die without heir, it shall be to his next brother, there is an apparent intention what heirs he intended; and the intention being collected by the will, the law shall adjudge accordingly" (c).

"I devise to my wife all my lands till my heir [the tes-

(a) *Tenny v. Agar*, 12 East, 253.

(c) *Webb v. Hearing*, Cro. Jac.

(b) *Dansey v. Griffiths*, 4 M. & S. 61.

tator supposing his eldest daughter *Susan* to be his heir] come of the age of 21. *Item*, I give to *Anne* and *Elizabeth* [testator's other daughters] 140*l.* a piece; and if *Susan*, my heir, die without heirs before 21, so that the land fall to *Anne*, then *Anne* shall pay *Elizabeth* the portion she herself was to have" (a).

"I devise, &c., to *William Turner* for his life, and to his heirs; and, for want of heirs of him, to *George Turner* for his life, and to his heirs; and, for want of heirs of him, to *William Flint* [next cousin and heir of *William* and *George Turner*], and his heirs for ever" (b).

"I devise, &c., to my eldest son; and, if he dies without heirs male, then to my other son" (c).

"I devise, &c., to *A.* [testator's second son], after the death of his mother, to hold to him and his heirs for ever; and, for want of such heirs, then to my right heirs" (d).

"I devise, &c., to *A.*; and, if he die without heirs, *B.*, his brother, shall have it" (e).

"I devise, &c., to my wife *Jane* for life; and, after her decease, to my son *Henry* for life; and, after his decease, to my son *George*, and his heirs for ever; and, if he dies without heirs, then to my two daughters, *Katherine* and *Jane*" (f).

"I devise all my lands to my wife *Joan* for her life; and my will is, that if my son *Richard* [testator's eldest son] do happen to die without heirs, then my son *John* shall enjoy my lands" (g).

"I give to my son, *James Towers*, all my estate in the parish of *Paddington*, and to his heirs; and, in default of

(a) *Tilly v. Collier*, 2 Lev. 162.

(e) *Allen v. Spendlove*, 1 Freem.

(b) *Parker v. Thacker*, 3 Lev. 70.

Rep. 74; 2 Eq. Cas. Abr. 305.

(c) *Blaxton v. Stone*, 3 Mod.

(f) *Tyte v. Willis*, Forrest. 1.

123.

(g) *Goodright v. Goodridge*,

(d) *Nottingham v. Jennings*, 1

Willes, 369.

P. W. 23.

such, to be equally divided between the heirs of my other children" (a).

"I devise, &c., to *Thomas Griffiths*, my grand-child, for and during his natural life; and, after his decease, to his right and lawful heirs and assigns for ever; and, for want of such lawful heirs, I do give the said lands to *Thomas Evan* [another grandson of the testator], his heirs and assigns for ever" (b).

"I devise, &c., to my daughter, *Marthana Legge*, to hold to her own use during the term of her natural life; and, after her decease, the same to go and be enjoyed by the children of her body begotten, and their heirs; and, in default thereof, to my son, *William Legge*, his heirs and assigns" (c).

"I devise, &c., all my free lands at *Creden* or *Kersoe*, to *Elizabeth*, my wife, for life; and, after her decease, to my son, *John Peart*, and his heirs for ever: all my lands lying in the parish of *Elmly Castle*, in the county of *Worcester*, and all my free lands, if it shall happen that my son *John* shall die unpossessed of them, or without heirs, I give to my daughter, *Sarah Peart*, and her heirs" (d).

4. *A limitation in fee explained to be determinable in favor of an executory devise.*

A LIMITATION in fee is often explained to be determinable on a contingency; an executory devise over in fee being limited on the contingency.

The devises which follow are of this description:—

"I devise to *Sir Edward Cleere*, and *Frances* his wife, my lands in *Elden*, in the county of *Norfolk*, to them and the heirs of *Sir Edward Cleere*, on condition that he assure

(a) *Pickering v. Towers*, 1 Eden. 142; *Amb.* 363.

(b) *Morgan v. Griffiths*, *Cowp.*

(c) *Ives v. Legge*, 3 T. R. 488, note (a).

(d) *Doe v. Bluck*, 6 Taunt. 485.

certain lands to my executors and their heirs, to perform my will; and if he fail, then I devise the said lands in *Elden* to my executors and their heirs" (a).

"I devise, &c., to *Thomas* my son, and his heirs for ever; and if *Thomas* dies without issue, living *William* his brother, then *William* his brother shall have those lands, to him and his heirs and assigns for ever" (b).

"I devise, &c., to my wife, for life; and after her decease, to my second son *Daniel*, in fee; provided and nevertheless, that if my third son *Nathaniel*, shall, within three months after the death of my wife, pay the sum of 500*l.* to *Daniel*, his executors or administrators, then I devise the land to *Nathaniel* and his heirs" (c).

"I give and bequeath unto *Edward Heath* all my messuages in *Hemblington* and *Clofield*, for ever: that is, if he have a son or sons who shall attain 21; but if my kinsman, *Edward Heath*, should chance to die, without son or sons to inherit, my will is, that the son of my son *William Heath*, shall inherit" (d).

IN the devises which follow, the executory devise over is limited on the contingency of *the devisee's dying in his minority*:—

"I devise, &c., to *A.* and his heirs; provided that if he dies within age, I devise, &c."; [Remainder over] (e).

"I devise, &c., to my wife *Katherine* for her life; and, after her death, to such child as she is now ensient with, and to the heirs of such child for ever; provided, that if such child, as shall happen to be born, shall die before

(a) *Fulmerston v. Steward*, cited 419.
Cro. Jac. 592.

(b) *Pells v. Brown*, Cro. Jac. C. 147.

590. See 3 T. R. 146.

(c) *Marks v. Marks*, 10 Mod. Palm. 136.

(d) *Heath v. Heath*, 1 Bro. C.

C. 147.

(e) *Hoe and Geril's Case*, cited

the age of 21 years, leaving no issue of its body, the reversion of one-third of the said lands shall go to my wife and her heirs; one-third to my sister *Elizabeth* and her heirs; and the other third to my sister *Ann* and her heirs" (a).

"The other two-thirds of all my real estate I give and devise to my son, *Matthew Peterson*, to hold to him, his heirs and assigns for ever; but my mind and will is, in case my said son shall happen to die before he shall attain the age of 21 years, or without issue, then I do hereby give and devise the said two-thirds of my said estate, to my wife, *Martha Peterson*, her heirs and assigns" (b).

"I devise my house, &c., to my son *Robert*, and his heirs and assigns for ever; and in case he shall happen to die in his minority, and unmarried, or without issue, I give it to my son *Harry*, and his heirs" (c).

Robert, the devisee in the last devise, came of age, and married, but died without issue, having left debts by specialty. On the question, what estate he took under the will; "I am clearly of opinion," said Lord *Hardwicke*, "this is a fee with an executory devise. This is not like the case of *Soulle v. Gerrard*, *Cro. Eliz.*, 529. Here it is one contingency, of *Robert's* dying under age, attended with two qualifications, of his being unmarried, or dying without issue. The word "or" has a reference to the different qualifications that may happen during the minority, which are all tied up to *Robert's* dying under age; and although the expression "*unmarried*" was unnecessary, yet the mother intended to express her desire, that if he married under age, the estate should vest so as to entitle the wife to

(a) *Gulliver v. Wicket*, 1 Wils. 193.

105. (c) *Framlingham v. Brand*, 3

(b) *Walsh v. Peterson*, 3 Atk. 390.

dower; therefore it is different from Lord *Vaux's* case, in *Cro. Eliz.* 269, because there it appears, by what the testator clearly expressed, that he designed by the words to make the several sentences so many contingencies. But it is not a general rule, that a *disjunctive* at the end of a period shall make all the preceding sentences disjunctives, if the intention appears against it. Upon the whole, I think the estate is to go over only upon one contingency, of *Robert's* dying during his minority, subject to the qualifications of his being unmarried, and without issue at his death; and, consequently, the estate vested in the plaintiff's husband, *upon his coming of age*, and is subject to his debts on specialty" (a).

IN the devises which follow, the executory devise over is limited on the contingency of *the devisee's dying without leaving issue at his death*.—

"I give all my freehold and copyhold lands, after the death of A. [the testator's heir at law] my executor, to B., his [A.'s] son, and his heirs for ever; but if he [B.] dies leaving no son, then to that son or sons my executor shall think fit to give them to by his last will; which son or sons so nominated (if B. dies as aforesaid) I declare shall have my lands" (b).

"I give and devise unto my son, *Philip Dobin*, his heirs and assigns for ever, all that messuage and tenement wherein I now live: but my will is, that in case my said son shall happen to die leaving no issue behind him, then my wife shall receive and take the rents, issues, and profits thereof, as long as she shall continue a widow, and no longer; and after her decease, or marriage as aforesaid,

(a) 3 Atk. 390.

Cas. Abr. 306, pl. 7

(b) *Fairfax v. Heron*, 2 Eq.

then the lands so devised to *Philip*, as aforesaid, I give and devise, for want of issue by him, as aforesaid, unto my son, *James Dobin*, his heirs and assigns for ever" (a).

"I devise, &c., to my grandson, *T. Friswell*, and to his heirs for ever; but in case my said grandson shall depart this life and leave no issue, then my will is, that the said dwelling-house, &c., shall be and return to *Elizabeth, Mary*, and *Sarah*, the three daughters of *W. and M. Friswell*, or the survivor or survivors of them, to be equally divided betwixt them, share and share alike" (b).

"I devise, &c., to my daughter, *Susannah Saunders*, her heirs and assigns for ever; but if my said daughter shall happen to die leaving no child or children, lawful issue of her body, living at the time of her death, then I give and devise all the said copyhold premises unto *Francis Barnfield* and his heirs" (c).

"I devise, &c., to my niece, *Mary Hiles*, her heirs, executors, administrators, or assigns for ever. And my will is, that in case my niece, *Mary Hiles*, shall happen to die and leave no child or children, then my will is, I give, devise, and bequeath unto my niece, *Jane Barnes*, all my freehold lands and tenements, to her and her heirs for ever, paying the sum of 1000*l.* to the executors of my niece, *Mary Hiles*, or to such person as she, by her last will and testament, shall direct" (d).

"I give and bequeath to my son, *William Frost*, and his heirs for ever, all my houses and lands, with all their appurtenances thereunto belonging; and if the said *W. Frost* should have no children, child, or issue, the said estate is, on the decease of the said *W. Frost*, to become the pro-

(a) *Porter v. Bradley*, 3 T. R. 143.

(b) *Roe v. Jeffery*, 7 T. R. 589.

(c) *Doe v. Wetton*, 2 Bos. & P. 324.

(d) *Doe v. Webber*, 1 Barn. & A. 713.

perty of the heir at law, subject to such legacies as he, the said *W. Frost*, may leave by will to any of the younger branches of the family" (a).

SECTION III.

Of explaining one devise by another.

THE whole will being subservient to make out the intention in a particular devise, it follows that the intention of a devise may be explained by another devise in the will (b).

In *Browne v. Jerves*, a testator, being seised in fee of lands in *Reculver*, *Edngton*, and *Ham*, devised in the words: "I devise all my lands to *John* my son and his heirs, and if he die without issue, I devise my lands in *Reculver* to *Matthew*, my nephew, in fee: Item, I devise my lands in *Ham* to *Henry*, my nephew, in fee." It became a question, whether it were a good devise to *Henry*, by way of remainder, after the death of *John* without issue; or an immediate devise to *Henry*, and a countermand of the devise to *John* of those lands. And it was resolved, "that it was a limitation by way of remainder to *Henry*, and no countermand; for the words, 'Item, I devise,' &c., shall be construed, that if *John* die without issue, then the land should remain as the devise was made to *Matthew*; and the first limitation to *John* is, as to him and his heirs of his body, and no fee, and so all the clauses

(a) *Doe v. Frost*, 3 Barn.&A. 546.

(b) *Browne v. Jerves*, Cro. Jac. 290. *Evans v. Astley*, 3 Burr. 1570. *Fenny v. Ewestace*, 4 M. & S. 58. *Macnamara v. Lord Whitworth*, Coop. 241. Lady

Dacre v. Doe, 8 T. R. 112. See *Hopewell v. Ackland*, 1 Salk. 239. *Cole v. Rawlinson*, 1 Salk. 234. *Cliffe v. Gibbons*, 2 Lord Ray. 1324. *Doe v. Westley*, 4 Barn. & C. 667.

of the will stand together." (a). In *Evans v. Astley*, Sir Samuel Daniel devised:—"to Samuel Duckenfield, my godson, and son of Charles Duckenfield of Mobberley, in the county of Chester, Esq. during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, to Charles Duckenfield, another of the sons of the said Charles Duckenfield, Esq. during his natural life, and to the heirs male of his body lawfully to be begotten; and for want of such issue, to John Duckenfield, another of the sons of the said Charles Duckenfield, Esq. during his natural life, and to the heirs male of his body lawfully to be begotten; and for want of such issue, then to every son and sons of the said Charles Duckenfield, Esq. which shall be begotten of the body of Sarah his now wife; and for want of such issue, then to William Hutton, of the city of Chester, during his natural life, and the heirs male of his body lawfully to be begotten, and want of such issue, then to Samuel Goldston, of East-Ham, in the county of Essex, my godson, for and during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, then to James Goldston, brother of the said Samuel Goldston, during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, to my own right heirs for ever." The will contained a proviso, obliging "the said Samuel Duckenfield and others as aforesaid," to take the name, and use the arms of the Daniels. Samuel, John, and Charles Duckenfield, the three sons of Charles Duckenfield of Mobberley, all died without issue. But Charles Duckenfield of Mobberley had a fourth son, named William, born after the date of the will. It became a question, what estate this William

(a) Cro. Jac. 290.

Duckenfield took under the will; and it was determined that he took an estate-tail. "It cannot be supposed," said Mr. Justice *Yates*, "that the testator meant a less benefaction to these unborn nephews, than to the three devisees, his nephews, who were in being. The clauses and circumstances prove his intention to be equal and the same to *all*" (a). Lord *Kenyon* has observed on this case, it being cited before him:—"As to the case of *Evans v. Astley*, the estate was limited in formal terms to the three first sons of the devisor's sister, and 'to the heirs of their bodies;' and, in the limitation to the fourth son, these words were omitted: but afterwards, when the devisor was directing what was to be done in conformity to his will, he took it for granted that an estate of inheritance was given to the fourth son, for he directed the sons of that fourth son to take his name and arms. And I remember that in determining that question the Court considered the rule adopted by Lord *Hale* *noscitur à sociis*; which was no pedantic or inconsiderate expression when falling from him, but was intended to convey, in short terms, the grounds upon which he formed his judgment (b). The kindred terms, to which the Court referred in *Evans v. Astley*, were the limitations to all the other brothers, and a requisition that the devisor's name and arms should be borne by them and their descendants. And the devisor could not be supposed to have intended that the estate, which was the substance, should go one way, and the arms and name, which were the shadow, another" (c).

In *Fenny v. Ewestace*, a testator devised:—"First, to his wife all his household goods, &c., to her and her heirs for ever; also he gave to his wife, three cow-commons, to her and her heirs for ever; 2dly, To his two nephews, *John*

(a) 3. Burr. 1570.

(c) 3 T. R. 86.

(b) See 8 T. R. 116.

and *Thomas Collings*, all that piece of land called *Priestlands*; also he gave to his nephews, *J. and T. Collings*, all that piece of land called *Longland*, to be equally divided between them, as tenants in common, and to their several heirs and assigns for ever: '3rdly, (he devised) *I give unto my nephew, John Collyer, all that my house and premises at Pitston, in the occupation of R. Read; I also give unto my nephew, John Collyer, all that my land in the parishes of Pidleston and Aubury, in the occupation of J. Tompkins, to him my said nephew John Collyer, his heirs and assigns for ever.*' 4thly, he gave to his brother, *F. Collyer*, one shilling a week for his life, for the payment of which he charged the house and premises in the occupation of *R. Read*." It was held, that *John Collyer* took a fee in the house and premises, as well as in the land. "Undoubtedly," said Lord *Ellenborough*, "if there be nothing in the context to connect the different clauses of a will together, they must be taken separately; but does not the arrangement in this will point out the connection which the testator intended; namely, a numerical order, connection, and division, between the several clauses of the will? In some of the clauses, he reserves the main sense in respect of the quantum of interest to the last; he says, he gives such lands to the particular devisee, and also such lands; and then, at the last, he states what the quantum of interest is that he gives. This is a question for a grammarian, rather than a lawyer, or which a school-master might decide as well as a judge. If it had not been for the numerical arrangement, there might have been some difficulty; but that removes it. It seems clear from the context, that both in the second and third clause, the testator, by reserving to the close of the entire sentence the words of limitation, meant to accumulate and comprehend within those words all that he had disposed of

in the preceding parts of the sentence. Therefore, it appears to me, that *J. Collyer* took under this devise an estate in fee." And *Le Blanc, J.*—"I think the numerical divisions clearly shew, that by the phraseology which the testator has used, both in the second and third clauses, he meant to describe, first, the persons and the property which were the subject of his devise, and to wait until the end to point out the estate he devised" (*a*).

(*a*) 4 M. & S. 58.

CHAPTER XII.

IF PRACTICABLE, EFFECT IS TO BE GIVEN TO ALL THE WORDS IN A WILL.

THE words in a will are the means to collect the testator's intention. In general cases, it is reasonable to suppose the testator has not unmeaningly used any of his words. An exposition, therefore, of a will, which gives effect to every word in it, appears, whenever practicable, to be the safest and best. It has been said by Lord *Kenyon*, "certain rules have been for a long time established, respecting the construction of wills, which we must not abandon; one is, that we must, if possible, give effect to *all* the words of the will" (a). "I cannot," said the Lord Chief Justice *Abbott*, in a late case, "reject from a will any word, unless I see that the meaning to be given to that word is contrary to some intention plainly expressed in other parts of the will" (b). And Mr. Justice *Holroyd*, in the same case:—"Now, I take it to be a rule of law, that we are not to reject any words in a will, unless it be to carry into effect the intention of the testator, apparent from the rest of the will" (c).

A person devised "to the use of his two nephews, and the survivor of them, and their heirs, equally to be divided between them, share and share alike." "It is a certain rule," said Lord *King*, on this devise, "in the exposition of wills especially, that every word shall have its effect, and not be rejected, if any construction can possibly be put upon it; and here I think there may; the first part of the devise, being to two, and the survivor of them, makes them plainly joint-tenants for life, and therefore they shall

(a) 8 T. R. 582.

(b) 2 Barn. & A. 448.

(c) *Ibid*, 451.

be so taken; and then as to the next words, 'and to their heirs, equally to be divided between them, share and share alike,' they are plainly words importing a tenancy in common, and shall operate accordingly, so as to make them tenants in common of the inheritance, by which construction of the will *every word* takes effect" (a). A person devised to his three sisters, "for and during their joint natural lives, and the natural life of the survivor of them; to take as tenants in common, and not as joint-tenants; and from and after the determination of their respective estates," [remainders over]. The devisees were held, in this case, to take as tenants in common with benefit of survivorship. "The fair construction," said Mr. Justice *Bayley*, "is to treat it as a devise to the sisters as tenants in common, with benefit of survivorship, and thereby give effect to *all* the words" (b).

(a) *Barker v. Giles*, 2 P. W. 280. (b) *Doe v. Abey*, 1 M. & S. 428.

CHAPTER XIII.

OF TWO INTENTIONS, THE CHIEF IS TO BE CARRIED INTO EFFECT, IF BOTH CANNOT.

THE whole will is, if possible, to be carried into effect (*a*). If the law cannot fulfil the *whole* intention of the testator, it will *as much of it as it is able* (*b*). In particular, if there are *two* intentions in a will, *both* of which *cannot* (*c*) be effected, the law will, *in the best manner it is able* (*d*), fulfil the one it considers to be the *chief* intention in the will (*e*).

In *Godolphin v. Godolphin*, the testator devised in the words: "I devise, &c., to my sister, *Mary Dixie*, and her heirs for ever; and my will is, that the said *Mary Dixie*, whom I make sole executrix, shall in six months' time after my decease, by some writing or good assurance in the law, settle so much of my estate as shall remain, after debts and legacies paid, on my brother *R.* for life, and on my sister *E.* for such time of her life as she shall be a widow, if she survives her husband; and, from and after their decease, on any other person or persons for their several lives, who are or shall be hereafter at any time descended from my mother, as my said sister shall think fit; in such manner and proportion, and subject to such rules and directions, as she shall in her discretion order

(*a*) *Barker v. Giles*, 2 P. W. 280. *Doe v. Bell*, 8 T. R. 579. *Doe v. Abey*, 1 M. & S. 428.

(*b*) *Humberston v. Humberston*, 1 P. W. 332, 2 Vern. 737. *Hutton v. Simpson*, 2 Vern. 722. *Wollen v. Andrewes*, 2 Bingh. 126.

(*c*) *Godolphin v. Godolphin*, 1 Ves. 21; 8 T. R. 9; 5 East, 207.

(*d*) 1 Ves. 23. 4 T. R. 87. 5 T. R. 303. 8 T. R. 10.

(*e*) *Godolphin v. Godolphin*, 1 Ves. 21. *Robinson v. Robinson*, 1 Burr. 38.

and appoint; and she may at any time during her life make void or change any appointment, and appoint or nominate any other new person to have and receive such profit and advantage out of my estate, as she shall think fit; provided it be to the descendants of my mother: because it is my desire, that my estate should continue to persons always descended from my mother; and, for this purpose, I advise that a writing may be made to trustees for 99 years, to the uses aforesaid. If she dies without executing the power, then my brother *R.*, within six months after her decease, may do it; and, on his dying without executing, any other relation shall appoint, with the consent of the *Lord Chancellor* for the time being."

The devisee, within six months after the testator's death, appoints with power of revocation; afterwards marries, and revokes, and limits new uses to trustees, to permit *W. Godolphin*, one of the plaintiffs, and a descendant of the mother, to receive the profits for his life, remainder to the first, &c., son, and the heirs male of such sons; and in the same manner to some other descendants of the mother, with a remainder to the right heirs of the mother.

The bill was, to have the benefit and establishment of this settlement; and the general question was, whether the devisee had power by the will to limit an inheritance. *Lord Hardwicke*: "From the tenor of the will, though not from the words, the testator's intention appears to have been, to provide for the younger branches of his mother's family: and, therefore, he gives nothing to the elder brother. He had great confidence in, and regard for his sister, and seems to have given her this power of revocation, to keep the rest of the family depending on her. I do not doubt but he might intend a succession of freeholds; and the words 'who are or shall be, &c.' look that way. The words 'manner and proportion' carry it

no farther than for life; nor 'such profit as she shall think fit;' otherwise she would have a greater power under the revocation than under the power itself. But the words on which I lay greater weight, and which I think enlarge the power to give a greater estate than for life, are, 'I advise that a writing,' &c. His *principal* intent is, that his estate shall continue to persons descended from his mother. This clue directs us through the will; and whatever is *the best method* for executing this intention must be taken, as far as the rules of law will allow. The objections are, that she [the donee of the power] has not confined herself to estates for life; and has limited to the right heirs of the mother. I am of opinion, that she had a right to go beyond estates for life. In *Humberston v. Humberston*, the words 'for life' are annexed to every person that is to take; and the negative exclusive word 'only,' in every clause; yet in that case an inheritance was decreed. So here the intent, that it should always continue in descendants of the mother, cannot take place without limiting an inheritance. The question, therefore, is, whether the words 'for their several lives' shall control the general intent. I think not. It is true, this will put it in the power of a common recovery; but then, unless an inheritance be some time or other created, it will be impossible it should go in the line the testator intended. As in *Shaw v. Weigh*, Eq. Ab. 185, where it was resolved in B. R. to be an estate for life; but by the *Lords*, that it was an estate-tail; because, though the other construction would preserve it longer, yet it would turn it out of the line" (a).

Robinson v. Robinson, was a case sent out of Chancery (b) for the opinion of the court of King's Bench on the follow-

(a) 1 Ves. 21.

(b) 3 Atk. 736.

ing devise: "I bequeath all my real estate to *Lancelot Hicks* of *Plymouth*, in the county of *Devon*, gentleman, for and during the term of his natural life, and no longer; provided that he alter his name, and take that of *Robinson*; and, after his decease, to such son as he shall have, lawfully to be begotten, taking the name of *Robinson*; and, for default of such issue, then I bequeath the same to my cousin *William Robinson*, and his heirs for ever. Item, my will and desire is, that he [*William Robinson*] have liberty to present whom he pleases to any vacancy that shall happen in any of my presentations during his life; and, in case any of his children shall take or be designed for holy orders, then it is my desire that, in case of any vacancy in either of my presentations, bonds of resignation be taken to such child or children, if the vacancy happen before he or they attain such orders: and, after the same shall be disposed of as aforesaid, then I give the perpetuity of the said presentations to the said Mr. *Lancelot Hicks*, in the same manner, and to the same uses, as I have given my estate," *Lancelot Hicks* took the name of *Robinson*; and, after the testator's death, had two sons, *George* and *Edmund*. *George* died in the life-time of his father. On the death of the father, leaving *Edmund* surviving him, it became a question what estate the father, *Lancelot Hicks*, took under the will. The court of King's Bench unanimously certified in these words: "We are of opinion, that, upon the true construction of the said will of the testator, *George Robinson*, the said *Lancelot Hicks* must, by necessary implication, to effectuate the manifest general intent of the said testator, be construed to take an estate in tail male, he, and the heirs of his body, taking the name of *Robinson*; notwithstanding the express estate devised to the said *Lancelot Hicks* 'for his life and no longer' (b)."

Robinson v. Robinson has been the leading authority in the exposition of the devises which follow; in all of which, the person clearly intended by the testator to be a tenant for life only, has been held to take an estate-tail.—

“ I give, devise, and bequeath to my nephew, *George Grew*, all my lands [naming them particularly]; to hold the same, with their appurtenances, to him the said *George Grew*, for and during the term of his natural life; and, from and after his decease, to the use of the issue male of his body lawfully to be begotten, and the heirs male of the body of such issue male; and, for want of such issue male, then I give all and every the aforesaid premises to my nephew, *George Dodson*, his heirs and assigns for ever” (a).

“ I give and bequeath to my nephew, *William Dymock*, all that my freehold estate situate at *Alhampton*; to hold to him during his natural life; and, after his decease, to and amongst his issue; and, in default of issue, to be divided between my nephew, *Elias Dymock*, and my niece, *Mary Dymock*, and to their heirs and assigns for ever” (b).

“ I devise, &c., to my grandson, *Nicholas Webb*, for life, without impeachment of waste; and, after his decease, to the issue male of his body lawfully begotten, and to the heirs and assigns of such issue male for ever; and for default of such issue male,” [remainders over] (c).

“ I hereby give and devise all my freehold messuages, land, &c., to my daughter, *Mary Ascough*, and the heirs of her body lawfully to be begotten, for ever, as tenants in common and not as joint-tenants; and, in case my said daughter shall happen to die before 21, or without leaving issue of her body lawfully begotten, then I give

(a) *Roe v. Grew*, 2 Wils. 322.
See 7 T. R. 534.

(c) *Denn v. Puckey*, 5 T. R. 299.

(b) *Doe v. Applin*, 4 T. R. 82.

and devise all those my said freehold messuages, lands, &c., to *R. Ascough*, his heirs and assigns for ever" (a).

"I give, devise, and bequeath to *Richard Cock*, son of my sister, *Elizabeth Cock*, deceased, all that messuage or tenement and lands in *Cowfold* in the county of *Sussex*; to have and to hold to my said sister's son, *Richard Cock* aforesaid, for the term only of his natural life; and, after his decease, I give and devise the same to the lawful issue of the said *Richard Cock*, as tenants in common; but, in case the said *Richard Cock* shall die without leaving lawful issue, then and in such case, after his decease, I give and devise the same to *Elizabeth Harding*, and to her heirs and assigns" (b).

"I give and bequeath to my nephew, *Bacon Frank*, all my estates whatsoever in the county of *York*; to hold to the said *B. Frank*, for the term of his natural life, without impeachment of waste, and with power to make a certain jointure thereout for any future wife; and, from and after his decease, then to the use of the issue male of the body of my said nephew *B. F.*, lawfully begotten, or to be begotten, and their heirs; and in default of such issue," [remainder over] (c).

"I devise, &c., to my daughter *Ann*, and to the heirs of her body lawfully to be begotten, whether sons or daughters, as tenants in common and not as joint-tenants; and, in default of such issue," [remainder over] (d).

I devise, &c., to my nephew, *Thomas Chapman*, for and during the term of his natural life; [remainder to trustees to preserve contingent remainders]; and from and after the decease of my said nephew, *Thomas Chapman*, then I give and devise the same to and amongst all and every the

(a) *Doe v. Smith*. 7 T. R. 531. (d) *Pierson v. Vickers*, 5 East,

(b) *Doe v. Cooper*, 1 East, 229. 548.

(c) *Frank v. Stovin*, 3 East, 548.

heirs of the body of the said *Thomas Chapman*, as well female as male, lawfully to be begotten, such heirs, as well female as male, to take as tenants in common, and not as joint-tenants; and for default of such issue," [remainder over] (a).

"I devise, &c., to *Henry Astley Bennett*, and his assigns, for and during the term of his natural life, without impeachment of waste; and, from and after his decease, to the heirs of his body, to take as tenants in common, and not as joint-tenants; and in case of his decease without issue of his body, to Lord *Ossulton*, his heirs and assigns for ever" (b).

The character of all these cases is, that there are two intentions in the will, both of which, it has been considered, the law cannot carry into effect. The one intention is, to give to one person a life-estate only; the other, to give to another person a remainder, but not before all the issue of the tenant for life are extinct. The latter the law considers to be the *chief* intention of the testator; and, as the *best means* (c) to fulfil the chief intention, it gives to the tenant for life an estate-tail (d).

(a) *Doe v. Harvey*, 4 Barn. & C. 610.

(b) *Bennett v. Earl Tankerville*, 19 Ves. 170.

(c) 4 T. R. 87. 5 T. R. 303. 8 T. R. 10.

(d) *Doe v. Halley*, seems to be a farther case professedly determined on the authority of *Robinson v. Robinson*; yet both intentions of the testator appear to be fulfilled in it. The devise is "to my nephew, *Michael Halley*, and his assigns, for and during the

term of his natural life, without impeachment of waste; and, from and after his decease, to the eldest son of my said nephew, *M. Halley*, lawfully to be begotten, and to the heirs of such eldest son; and in default of issue male of my said nephew" [remainders over]. Under this will, it was held that *Michael Halley* took an estate for life, remainder to his eldest son in tail-male, remainder to himself in tail-male.—(8 T. R. 5).

CHAPTER XIV.

THE INTENTION AT THE TIME THE WILL IS MADE CAN ALONE BE EFFECTED.

THE law will not fulfil an intention which is not expressed in the will (*a*). It is, therefore, the intention of the testator at the time he makes his will, which alone the law will carry into effect. Events, which have happened since the publication of a will, are unavailable to introduce an intention into it. It is legal, nevertheless, to anticipate in a will many events which may happen, and to provide for them. There is, it is apprehended, the distinction, that the *effect* of a will may be changed by events which have happened since it was published, as in the instances of lapsed devises, and devises on contingencies; but not the *intention*; for then it would not be the intention expressed in the will.

It is often said, that "the intent of a testator is to be taken as things stood at the time the will was made" (*b*). This position is scarcely correct. At least, it does not admit of universal application. For, indisputably, a testator is at liberty, in many instances, to anticipate events. All devises in contingency depend on this liberty. If a termor for years devises his land, his term, or his lease; unless a contrary intention appears in the will, he is, indeed, understood to mean to devise only the interest he possesses in the land when the will was made; and if he afterwards takes another lease of the same land, the lease taken after the making of the will, will not pass by

(*a*) 3 Burr. 1541. 1 T. R. 201.
3 T. R. 85, 86.

(*b*) Willes, 297. 5 Barn &
C. 69.

it (a). But it is legal to anticipate a new lease for years, and the termor is at liberty to devise his present lease; and also, if he pleases, prospectively any future lease for years he may have of the same land; and if the lease, subsisting when the will is made, determines before his death, and a new lease for years is taken, it will pass by the devise, although renewed after the making of the will (b). In this instance it can scarcely be said, that the intent of the testator is taken "as things stood at the time the will was made," and yet, as the particular event may legally be anticipated, the devise is valid.

It has been said by Lord *Hardwicke*, and it is often repeated, that "a will must be made to speak from the testator's death, and be looked upon not only as his last will, but last words" (c). It is true, that a will speaks from the death of the testator; but what does it speak? Does it say more than what the testator said when he made his will? Were it permitted to say more, clearly the law would fulfil an intention which is not expressed in it.

(a) 6 Madd. Rep. 83, 84.

(c) 1 Ves. 53. 1 T. R. 204.

(b) 2 Atk. 599. *Colegrave v. Manby*, 6 Madd. Rep. 72.



CHAPTER XV.

OF PRESUMING THE TECHNICAL EFFECT OF THE WORDS IN A WILL TO BE INTENDED.

SECTION I.

THE technical effect of the words in a will is presumed to be intended, if a different intention does not appear in the will (*a*).

Of the word *Heirs*.

A TESTATOR may, if he pleases, make the word *heirs* a word of purchase (*b*); but, technically, it is a word of descent (*c*).

If a testator devises simply to the heirs of *A.*, it is evident that, as he does not devise to *A.* himself, the heirs of *A.* cannot take from him by descent; for to descend, the estate must come from *A.* at his death (*d*). In this case, therefore, the heirs of *A.* must take, if at all, by purchase (*e*). The effect will be the same if the limitation is not to the heirs *general*, but to the heirs *of the body* of *A.* (*f*). When heirs take by *purchase*, they do not take *as heirs*; but as a class of persons, whom, by that name, the testator has selected to devise his property to (*g*). Whenever an heir takes as *heir*, he takes by *descent* (*h*).

(*a*) 1 Salk. 238. Doug. 327.
Amb. 377. - 1 Bro. C. C. 221.
1 Bos. & P. 57.

(*b*) Watk. Desc. 170.

(*c*) 2 Ld. Raym. 1440.

(*d*) Co. Litt. 13 b; 18 b; 237 a.

(*e*) Watk. Desc. 156.

(*f*) See Sugd. Gilb. Uses, 3d
edn., 36, note (8).

(*g*) Co. Litt. 3 b; 18 b. Watk.
Desc. 156.

(*h*) 1 Bro. C. C. 220.

There appears formerly to have been this distinction between purchase and descent on a limitation in tail;—that if “heirs of the body” were words of descent, then *all* the issue of the ancestor might take under the limitation; but if of purchase, then, although there were many sons, the eldest alone, and his issue, would be heirs, and the younger sons never could take under the limitation. The occasion of the rule in *Shelley’s* case, has been attributed to this distinction by the Lord Chancellor *Parker*. “The reason of that case,” he observes, “was, for that if the estate-tail had vested in the eldest son by purchase, and that ‘heirs male of the body’ should have only been a description of a person, that then, if he had died without issue, there had been (as was then held) an end of the estate-tail, and none of the younger sons could have succeeded to it; but this has been held otherwise since that time, and a judgment in point, in *Carter’s Reports*, that the estate-tail should go to all the sons successively, notwithstanding its vesting in the eldest son by purchase” (a). The distinction, therefore, is now no longer admitted; and where heirs of the body take by purchase, all the issue of that body are, successively, as much entitled to inherit, as if the estate had been limited to their ancestor, and they derived their title by descent from him. On the failure of the issue of a first son, the entail will devolve on the second son and his issue. *Mandeville’s* case is in point. *John de Mandeville* by his wife *Roberge* had issue *Robert* and *Mawde*. *Michael de Moreville* gave certain lands “to *Roberge* and to the heirs of *John Mandeville*, her late husband, of her body begotten;” and it was adjudged, “that *Roberge* had an estate but for life, and the

(a) 1 Eq. Cas. Abr. 390. See Uses, 3d ed. 36, note (8).
8 T. R. 519; and Sugd. Gilb.

fee-tail vested in *Robert* (heirs of the body of his father being a good name of purchase), and, that when he died without issue, *Mawde* the daughter was tenant in tail, as heir of the body of her father, *per formam doni*" (a). It is observable, that, as *Mawde* did not claim by descent from her brother, she would have been entitled to the entail at his death without issue, although she had been of the *half-blood* to him. Her claim was as a *purchaser per formam doni* (b).

When an heir takes land by purchase, he is capable of transmitting it to his *own* heirs, without any *actual* seisin in himself; but, when he takes by *descent*, although the estate descended is, for many purposes, sufficiently vested in him before his own actual seisin; yet it is indispensably requisite that he be *actually* seised of the estate so descended, in order to make *himself* the stock of descent or *terminus*, and, by this means, the estate descendible to his *own* heirs. For, if he dies before entry, or other actual seisin obtained, the brother of the half-blood will succeed to the inheritance, in exclusion of the sister of the whole, as the person claiming must make himself heir to him who was last *actually* seised (c).

SECTION II.

Of the *Rule in Shelley's Case*.

THE rule in *Shelley's case* is: "When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail;

(a) Co. Litt. 26 b.

(c) Watk. Desc. 23, 42.

(b) *Ibid*, note (3).

that always, in such cases, the word 'heirs' is a word of limitation of the estate; and not a word of purchase" (a).

This rule has obtained in the exposition of wills, where the two limitations have been immediately together; as in the following devise:—

"I devise, &c., to (trustees), to all the uses, intents and purposes hereinafter mentioned, that is to say; first of intent and purpose, that they shall permit and suffer *George Ramsden*, my son, to have, receive, and take the rents (b), issues, and profits of the said messuages, &c., for and during the term of his natural life; and, after his decease, shall stand seised thereof, to the use of the heirs of the body of the said *George*, my son, lawfully begotten and to be begotten; and, for default of such issue," [remainders over] (c).

The effect of the two limitations has been the same; where, on the devise to the heirs, a farther limitation to their heirs has been added; as on devises in the words:—

"I devise, &c., to *Nicholas Lisle*, for his life; and, after his decease, to the heirs male of the body of the said *Nicholas*, lawfully to be begotten, and his heirs for ever; but, if the said *Nicholas Lisle* should happen to die without such heir male," [remainders over] (d).

"I devise, &c., to my nephew, *William Legate*, for and during the term of his life; and, after his decease, to the heirs male of the body of my said nephew, and the heirs male of the body of every such heir male, severally and successively, as they shall be in priority of birth; and, for want of such issue," [remainders over] (e).

(a) 1 Co. 104. Co. Litt. 22 b; 319 b.

(b) See 1 Ves. 154.

(c) Broughton v. Langley, 2 Ld. Raym. 873.

(d) Goodright v. Pully, 2 Ld. Raym. 1437.

(e) Legate v. Sewell, 1 P. W.

87. See 2 Ves. 657.

"I give and bequeath to my daughter *Lucretia*, wife of *G. Andrews*, all my plantation, &c., during the natural life of my said daughter. Item, I bequeath to the heirs of the body of my said daughter *Lucretia*, begotten or to be begotten, and to his or her heirs for ever, after my said daughter's decease, all my before-named plantation, &c.; but, for want of such heirs of the body of my said daughter, I give and bequeath the aforesaid premises, after the decease of my said daughter, to my own next heirs, and their heirs for ever" (a).—

The rule in *Shelley's* case has, secondly, obtained, where the limitation was to the heir (in the singular number) (b) of the devisee; as in these devises:—

"I devise, &c., to *A.* for life; and, after his decease, to the next heir male; and, for default of such heir male" [remainder over] (c).

"I devise, &c., to *A.*, and *B.* his wife, for their lives; and, after their decease, to the next heir male of their two bodies" (d).

"I devise, &c., to my son, *Thomas Trollope*, for life; and after to the first heir male of his body lawfully begotten. For want of such heir male," [remainders over] (e).

The rule has, thirdly, obtained, where a limitation has intervened between the limitation to the devisee and the devise to the heirs; as in the following devise:—

"I devise, &c., to *A.* for his life, without impeachment of waste; and, from and after the determination of that estate in *A.*'s life-time, to (trustees) and their heirs, during

(a) *Morris v. Ward*, cited 8 T. R. 518.

(b) See 2 Ves. & B. 371.

(c) *Burley's Case*, cited 1 Vent. 230.

(d) *Miller v. Seagrave*, cited Rob. Gav. 3d ed. 122.

(e) *Dubber v. Trollope*, Amb. 453.

the life of A., to preserve contingent remainders; and from and after the determination of that estate, to the heirs of the body of A." (a).

In *Colson v. Colson*, a person devised "to *Robert Colson* for his life, remainder to A. and B., and their heirs, to support contingent remainders, during the life of *Robert Colson*, remainders to the heirs of the body of *Robert Colson*, lawfully begotten" (b). It became a question, in a suit in Chancery on this will, whether *Robert Colson* took an estate for life or in tail; and Lord *Hardwicke* referred the point to the Judges of the court of King's Bench, who returned their certificate in these words: 'We have heard counsel in the question referred by your Lordship to us; and, as it appears by the state of the case, there is, after the determination of the estate for life to *Robert Colson*, a devise to *Isabell*, his daughter, and to *Ralph Robinson*, and their heirs, for and during the life of *Robert Colson*. We are of opinion, that by reason of the remainder interposing between the devise to *Robert* for life, and the subsequent limitation to the heirs of his body, the said *Robert* took an estate for life, not merged by the devise to the heirs of his body, but by that devise an estate-tail in remainder vested in the said *Robert*" (c). A certificate in *Hodgson v. Ambrose* (d), on similar limitations, is to the same effect.

The rule in *Shelley's* case has, farther, obtained, where an estate to the ancestor has been *implied* (e) only. The rule is applicable, also, on devises of *equitable* (f) estates.

(a) *Papillon v. Voice*, 2 P. W. 471.

(b) 2 Atk. 246.

(c) *Ibid*, 250.

(d) Doug. 323.

(e) *Hayes v. Foorde*, 2 Bl. 698.

(f) *Bale v. Coleman*, 1 P. W. 142.

Garth v. Baldwin, 2 Ves. 646.

Wright v. Pearson, Amb. 358.

Austen v. Taylor, *ibid*, 376.

Jones v. Morgan, 1 Bro. C. C. 206.

Philips v. Brydges, 3 Ves. 120.

SECTION III.

Of the word *Issue*.

A TESTATOR may make *issue* a word of descent; but, in its technical meaning, it is a word of *purchase* (a). It has been construed as a word of purchase in the cases cited in the margin (b). In *Cook v. Cook*, there was a devise 'to the issue of J. S.;' who, at the death of the testator, had a daughter living, and afterwards had a son born. The question was, who should take, and what estate. The *Lord Keeper*: "All the children shall take, and even grandchildren, if there had been any; but they shall take only an estate for life. And although the devise is to the issue begotten, that makes no difference; the words 'begotten', and 'to be begotten', are the same, as well upon construction of wills, as settlements, and take in all the issue after begotten. And, although upon the death of the testator, there was then only a daughter born; yet, upon the birth of another child, the estate shall open, and take in the after-born son" (c). In *Loddington v. Kime*, Sir *Michael Armin* devised 'to A. for life, without impeachment of waste; and, in case he have any issue male, then to such issue male, and his heirs for ever; and if he [A.] die without issue male, then to B. and his heirs for ever.' A. entered, and died without issue. On the question, whether A. was tenant in tail by this devise, "*Powell, J.*, held the express estate

(a) 2 Ld. Raym. 1440. 2 Atk. 4 T. R. 294. *Merest v. James*, 582. 4 T. R. 299. 6 Co. 17 b. 1 Brod. & B. 484. See also 3 2 Vern. 546. Atk. 397. *Bruce v. Bainbridge*,

(b) *Cook v. Cook*, 2 Vern. 545. 2 Brod. & B. 123.

Loddington v. Kime, 1 Salk. 224. (c) 2 Vern. 545.

1 Ld. Raym. 203. *Doe v. Collis*,

for life not destroyed by the implication that arose on the latter words following: so that *A.* was only tenant for life; and the rather, because these words, 'impeachment of waste,' and 'for life' must in that case be rejected, *quod Treby, C. J., concessit*. Secondly, the Court held, that 'issue' was to be taken here, as *nomen singulare*, because the inheritance was annexed and limited to the word issue; so that the inheritance was in the issue, and not in *A.*, the father. Thirdly, that this limitation to the issue was not an executory devise, being after a freehold, but a contingent remainder. Fourthly, that the remainder, limited to the issue of *A.*, was a contingent remainder in fee; and that the remainder to *B.* was a fee also; but those fees are not like one fee mounted on another, nor contrary to one another, but two concurrent contingencies, of which either is to start, according as it happens; so that these are remainders contemporary, and not expectant one after another" (a). In *Doe v. Collis*, a person devised "to his daughters, *Eleanor Newsom*, and *Susannah*, the wife of *William Head*, to be equally divided between them, not as joint-tenants, but as tenants in common; namely, the one moiety, or half part thereof, to his daughter, *Eleanor Newsom*, and her heirs, for ever; and the other moiety to his daughter, *Susannah*, the wife of *William Head*, during the term of her natural life; and, after her decease, to the issue of her body lawfully begotten, and their heirs, for ever." *William* and *Susannah Head* had three daughters. It was held, that the testator used issue as a word of purchase, and, consequently, that *Susannah Head* took only an estate for life, and her children, as purchasers, a fee-simple (b). In *Merest v. James*, *John Pearson* devised to trustees as follows: "To the use of my daughter, *Eunice Anna Pearson*, for and during her natural life, and from,

(a) 1 Salk. 224.

(b) 4 T. R. 294.

and immediately after her decease, then to the issue of her body lawfully begotten; and in default of issue, or in case none of such issue live to attain the age of 21 years," [remainders over]; and it was held that *Eunice Anna Pearson* took an estate for her life only under this will (a).

SECTION IV.

Of the word *Son*.

A TESTATOR may make *son* a word of descent, but, in its technical meaning, it is a word of *purchase* (b). It has been construed as a word of *purchase* on a devise, "to my brother *Henry*, and his first and every other son in tail male: failure of such issue, to my brother *Edmund*, and his first and every other son in tail male; [remainders over]; in all the foregoing cases, without impeachment of waste, other than wilful. The renewals to be made by the tenant for life. I name for the executors, in trust of this my will, Mrs. A. J., my brother *Henry Phipps*, or whichever of my brothers may succeed to the estate." The testator's brother, *Henry*, was held to take under this will a life estate only, with a remainder in tail to his issue (c).

SECTION V.

Of the word *Children*.

A TESTATOR may make *children* a word of descent, but, in its technical meaning, it is a word of *purchase* (d).

(a) 1 Brod. & B. 484.

T. R. 320.

(b) 5 T. R. 323, 324; See 2 Barn. & C. 533.

(d) 6 Co. 16 b; 17, 17 b. 2 Atk. 222. 2 Vern. 545. 5 T. R. 323.

(c) Doe v. Lord Mulgrave, 5

It has been construed as a word of purchase on devises in the words:—

“ I devise, &c., to *A.*, and *B.* his wife, and, after their decease, to their children” (*a*).

“ I give my messuage, &c., to my son, *Jeffrey Laming*, for his life, and, after his death, unto all and every his children equally, and to their heirs” (*b*).

“ I devise, &c., to my niece, *Dorothy Comberbach*, wife of my nephew, *James Comberbach*, for life; [remainder to trustees, to preserve contingent remainders; remainder] to all and every the children of *Dorothy Comberbach*, begotten, or to be begotten, of her body, by my nephew, *James Comberbach*, and their heirs, for ever, to be equally divided between and among such children (if more than one), share and share alike; but if only one child, then to such only child, and his or her heirs for ever” (*c*).

“ I devise, &c., to the use of my son, *Thomas Grace*, for his life; and, after his decease, to the use of all the children of the body of my said son lawfully issuing (but exclusive of his eldest son, in case of there being two or more such children besides him), their heirs and assigns, for ever, as tenants in common, and not as joint-tenants; but in case my said son should depart this life without leaving any lawfully begotten child or children, or issue of any such child or children, then, after his decease, to the use of my daughters, *Ann Smith* and *Mary Smith*, and their heirs, as tenants in common” (*d*).

“ I devise, &c. to my daughter, *Mary*, and to all and every the child and children, whether male or female, of her body lawfully issuing; and unto his, her, and their

(*a*) *Wild's Case*, 6 Co. 17. See *Goodwin v. Goodwin*, 3 Atk. 370.

(*b*) *Goodright v. Dunham*, Doug.

251. See *Fearne*, Con. Rem. 375.

(*c*) *Doe v. Perryn*, 3 T. R. 484.

(*d*) *Smith v. Horlock*, 7 Taunt. 128.

heirs or assigns for ever, as tenants in common, and not as joint-tenants" (a).

SECTION VI.

Of the word *Estate*.

THE technical meaning of the word *estate* is ownership of land: the popular meaning of it is, undoubtedly, the *land itself*. The interpretation which this word, when used in a will, is to receive, became a question in *Wilson v. Robinson* (b), and *Carter v. Horner* (c); but in neither is the point decided; it is only argued. It appears to have been first (d) decided in the subsequent case of the Countess of *Bridgewater v. the Duke of Bolton* (e), where it is determined, that in a will, if a different intention does not appear (f), the word 'estate' is interpreted to mean not only land, but the owner's property in land; and, therefore, if a person devises his *estate*, the land, and all his interest in it, whether in fee, *pur autre vie*, or for years, will pass under that technical word. The question in the Countess of *Bridgewater v. Duke of Bolton*, arose on the devise of a residue in the words, "all other my estate, real and personal;" and the Lord Chief Justice *Holt*, in giving judgment, explained, at some length, the technical meaning of the word estate. "The word estate," he said, "is a *genus generalissimum*, predicable of two species that have their difference, whereby they are divided, that is, estate real, and estate personal. Estate real is *genus subalternum*, and has its species too; that is, estate real in fee, or

(a) *Jeffery v. Honywood*, 4 Madd. Rep. 398.

(b) 1 Mod. 100. 2 Lev. 91.

(c) 4 Mod. 89.

(d) 2 P. W. 524.

(e) 6 Mod. 106. 1 Salk. 236.

(f) See 5 Burr. 2639. 1 T. R. 414. 7 East. 267

for life. And so is estate personal, in like manner, to be branched into chattel real and chattel personal; and it has that difference of a chattel real, not because it is a real estate, but because it has a real extraction. A man, seised in fee, makes a lease for years; lessee for years has a chattel real, because his estate is derived out of a real estate; but still it is not a real estate, for it is a testamentary, and devisable by will, at common law, by the owner; so that if it were of lands in knight-service, or in capite, the owner could not devise the land for a term; but, if he had made a lease for years of it, then it became a chattel in the lessee, and, consequently, devisable. So that the words real estate cannot be satisfied without a freehold, at the least, pass; for a chattel real is no real estate. And this is no new question; for *vide* 1 Rol. Ab. 854; Style, 493; that the word estate comprehends both, viz, freehold, and chattels real and personal (a), especially if the words real and personal be added." And it being objected, "that the word 'estate' is understood, not of the interest which a man has, but of the thing itself; if a man gives, by will, all his estate in such a house, then the interest passes; but if he devises all his estate without ascertaining in what, the thing, and not the interest, shall pass;" Lord Holt replied: "But I do not think so; for the word 'estate' does, in truth, comprehend the thing and interest" (b).

On the authority of *The Countess of Bridgewater v. the Duke of Bolton*, a devisee has been held to take a fee-simple under the word 'estate,' in the devises which follow:—

"All the rest and residue of my real and personal estate whatsoever I give to my dearly beloved wife, *Anne Nott*" (c).

(a) See *Doe v. Chapman*, 1 H. Bl. 223. *Ibid.* 2. *Barnes v. Patch*, 8 Ves. 604.

(b) 6 Mod. 106. 1 Salk. 236.

(c) *Murry v. Wyse*, 2 Vern. 564. *Tanner v. Wise*, 3 P. W. 295.

"I devise all my land and estate in *Upper Catesby*, in *Northamptonshire*, with all their appurtenances, to *William Edgeworth*, of *St. Margaret's*, Esq." (a).

"I do by this my will dispose of such worldly estate as it hath pleased God to bestow on me. First, I will that all my debts be paid and discharged; and, out of the remainder of my estate, I give and bequeath unto my wife 300*l*. My mind and will is, that my wife have one moiety of what is left after my debts paid" (b).

"I give and bequeath to *Mrs. Marten* my estate at *Braywick, Berks.*" (c).

"I give, devise, and bequeath unto my grandson, *John Wright*, all my estate, lands, &c., known and called by the name of the coal-yard, in the parish of *St. Giles, London*" (d).

"All the estate which I have I intend to settle in this manner; My estate in *Kirby Hall*, near *Henningham Castle*, by *Henningham* town, which is 135*l*. per annum; 128*l*. Exchequer annuity, [and stocks enumerated]; all which I give to my dear brother, *Anthony Springet*. After his death, my desire is, that it should be disposed of after this manner: to Mr. *William Tuffnel*, the son of *Samuel Tuffnel*, Esq., at *Langley*, in *Essex*, my estate at *Kirby Hall*" (e).

"All the rest, residue, and remainder of my goods, chattels, and personal estate, together with my real estate, not hereinbefore devised, I give to A." (f).

"I give to my son, *Charles Gale*, all that estate I bought of *Mead*, after the death of my wife" (g).

(a) *Barry v. Edgeworth*, 2 P. W. 523.

(b) *Beachcroft v. Beachcroft*, 2 Vern. 690. See 3 P. W. 297.

(c) *Holdfast v. Marten*, 1 T.R. 411.

(d) *Roe v. Wright*, 7 East, 259.

(e) *Tuffnel v. Page*, 2 Atk. 37.

(f) *Ridout v. Pain*, 3 Atk. 486. 1 Ves. 10.

(g) *Bailis v. Gale*, 2 Ves. 48.

A fee-simple has been held to pass under the word 'estate' in the farther cases cited in the margin (a).

The word '*estates*,' in the plural, has also been interpreted to signify an interest in land, and has passed a fee-simple in the following devises:—

"I give to *A.* the income of my four shares in the corn-market, for his natural life; and all the rest of my *estates*, with all monies in stocks, and in *B.*'s hands, or any other securities, to be divided in equal shares to *C.*, *D.*, and *E.*, share and share alike" (b)

"I devise to my wife, *Ellen*, all and singular my freehold lands, messuages, and tenements, at *Tutbury* and *Hanbury*, or elsewhere; together with all my household goods, cattle, chattels, debts, and all my implements of husbandry, &c., for her natural life; and, after her decease, then all the said estates, goods, &c., to be divided among my sons, *A.*, *B.*, and *C.*, share and share alike" (c).

Technically, the words *real estate* signify freehold or copyhold (d) lands, and freehold estates in them. The word '*estate*,' includes all real and personal estate (e), and, therefore, a term of years; but the words '*real estate*,' are applicable to *freehold* estates alone, and a term of years is not included in them (f).

SECTION VII.

Of the word *Effects*.

THE popular meaning of the word *effects* has become,

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| (a) <i>Smith v. Coffin</i> , 2 H. Bl. 444. | (d) 3 Atk. 75. 1 Cox R. 362. |
| <i>Harding v. Gardner</i> , 1 Brod. & B. | (e) 6 Mod. 107. 3 Keb. 49. |
| 72. <i>Doe v. Gilbert</i> , 3 Brod. & | <i>Doe v. Chapman</i> , 1 H. Bl. 223. |
| B. 85. | <i>Barnes v. Patch</i> , 8 Ves. 604. See |
| (b) <i>Fletcher v. Smiton</i> , 2 T.R. 656. | also Cowp. 306. |
| (c) <i>Roe v. Bacon</i> , 4 M. & S. 366. | (f) 6 Mod. 107. 2 Sim. & St. 337. |

also, the technical meaning of it. It may signify real property in a will, if it appears the testator has used it in that sense; but, unexplained, the word denotes *personal* property alone (a). The unexplained meaning of the word effects in a will first became a question in *Doe v. Dring*. In this case, a person devised in the words: "I, *Robert Hick*, do declare this to be my last will and testament, by which I do give and bequeath to my wife, *Elizabeth*, all and singular my effects, of what nature or kind soever, to her own use and enjoyment, during her natural life; and, at her death, to be equally divided between our surviving children." "No case", said Lord *Ellenborough*, "has ever yet come before the Court, touching either a will or any other subject, that I am aware of, where the Court have been called upon to pronounce on the technical meaning of the word effects, denuded, as it is here, of all context; unless, indeed, the words 'of what nature or kind soever' can be considered as context and explanatory of it. In *Camfield v. Gilbert* (b), and *Doe v. Lainchbury* (c), it was taken for granted, that effects in its natural signification imports personal effects; and no case has yet occurred in which that signification, unaided by context, has been extended to real estate. Where a testator has used the general introductory words 'as to all my worldly substance,' and the word effects has been coupled with the words 'real and personal,' as in *Hogan v. Jackson* (d), there it has been considered, that the context gave it a more enlarged and comprehensive sense than it would otherwise have borne, and the word effects has, from the declared intention of the testator, been holden to pass the

(a) *Hogan v. Jackson*, Cowp. 299. *Doe v. White*, 1 East, 33. *Doe v. Dring*, 2 M. & S. 448. 5 Madd. Rep. 71.

(b) 3 East, 516.

(c) 11 East, 290.

(d) Cowp. 299.

whole interest in the land. And so in *Doe v. White (a)*, the words 'said effects,' by reference to the antecedent bequest, which comprehended both real and personal, were holden to include the real also; but that was so held by the Court, not upon the import of the word effects simply, but as it derived force from the reference that was given to it. On the other hand it may be said, that in *Camfield v. Gilbert*, the Court in holding that the word effects did not extend beyond the personalty, did not decide upon the general import of that word, because there was some context which favoured the narrower construction, for the testatrix excepted out of her effects, her wearing apparel and plate, which was an exception clearly of a personal nature, and also directed that her effects should be divided by her executors. In the present case, therefore, for the first time, the Court is called upon to give it a sense unaided by context. We have a familiar meaning attached to the word effects, in its common use, and as it is used in the statutes relating to bankrupts, where 'estate and effects,' *reddendo singula singulis*, denote, the one, things personal; the other, things real; and I am not aware of any case where it has been holden in its primary and original signification to mean things real." His Lordship and the three other Judges determined, in the particular case, that the word effects, unexplained by any other part of the will to be intended to include real estate, passed the *personal* property alone of the testator (b).

SECTION VIII.

Of the word *Hereditaments*.

HEREDITAMENT is a name of land. Land, being i

(a) 1 East, 33.

(b) 2 M. & S. 448.

heritable, is a hereditament (a). But the word hereditament does not, besides, mean *interest* (b) in land. If A., seised in fee, devises land, by the word hereditament, to B., if there are not other words in the will to determine the *interest* devised, B. will be entitled to an estate for *life* only in the land.

In *Denn v. Mellor*, on a devise in the words, "All the rest of my lands, tenements, and hereditaments, either freehold or copyhold, whatsoever and wheresoever, I devise to my wife, *Sissily Carr*;" it was said, by Lord *Kenny*: "It has been contended on another ground, that the wife of the devisor took a fee, because the word 'hereditaments' is used in the devise to her; but the cases cited (c) by the plaintiff's counsel, shew, that that word is not sufficient to pass a fee, and those cases are not opposed by any one judicial authority" (d).

SECTION IX.

Of the word *Appurtenances*.

THE word *appurtenances* is, perhaps exclusively, a law term. It is derived from the Latin word, *pertinens*, belonging, (e). It seems, therefore, to be a word of popular use, become a technical term by long and exclusive usage. In popular speech, a garden, for instance, will be said to *belong* to a house. Technically, it will be said to *appertain* to it, or to be an *appurtenant* of it. To belong, in this instance, evidently implies, that, of the two subjects of pro-

(a) Co. Litt. 6 a.

240. Doe v. Richards, 3 T. R.

(b) 1 Salk. 239. 8 T. R. 503.

356.

1 Bos. & P. 562.

(d) 5 T. R. 563.

(c) Hopewell v. Ackland, Salk.

(e) See Spelman Gloss. v. Per-

239. Canning v. Canning, Mosel.

tinacia.

perty, the appurtenant has been made to be inseparably used with the principal (a). To belong implies, also, *connexion* or *nearness* (b). An appurtenant, therefore, seems to be *any* subject of property, in purpose, made to be inseparably used with a principal, and, in place, near to it.

In a case, determined in the reign of Henry VIII., a person made a feoffment of a house, with the appurtenances; and it was held that nothing passed by these words, 'with the appurtenances,' but the garden, the curtilage, and close adjoining to the house, and on which the house was built, and no other land; although other land had been occupied with the house (c). It is added, by *Brooke*, in his abridgment of this case, "yet in the time of Henry VIII., it was customary to add these words 'and all lands, tenements, and hereditaments, to the same house belonging, or with the same occupied, let, or demised;' and, by these words, the land used with the house passed" (d). It is said in *Bettisworth's* case, "when a man makes a feoffment of a messuage *cum pertinentiis*, he departs with nothing thereby but what is parcel of the house; scilicet, the buildings, curtilage, and garden" (e). In *Hearn v. Allen*, *Richard Keene* was seised in fee of a messuage, and of two acres of land, in *Chipping Norton*, and of two acres of meadow in *Kingham*; and used and occupied the two acres of meadow, being four miles distant from the house, together with his lands and tenements in *Chipping Norton*. By his will, he devised the house "*cum omnibus et singulis pertinentiis ad inde vel aliquo modo spectantibus.*" It became a question, whether, by this devise of the house, with the appurtenances, the two acres of meadow passed;

(a) See 2 Co. 31 b. 2 Sir W. BL Rep. 1151.

(b) See *Spelman Gloss. v. Pertinens.*

(c) Bro. Abr. tit. Feoffments de terres, 53.

(d) *Ibid.*

(e) 2 Co. 32.

being used with it ; and it was determined, they did not pass, “ because by the words ‘ *cum pertinentiis*,’ land passeth not, but only such things which properly may be pertaining. Otherwise it is, if it had been ‘ *cum terris pertinentibus*’; then that which was used with it would have passed ; but by the bare words *cum pertinentiis*, without other circumstances to declare the testator’s intent, they shall never pass” (a). *Buck v. Nurton*, was an ejectment to recover 64 acres and a half of land, consisting of a park, meadow-land, pasture-land, and orchards. *Edward Clarke*, the testator in this case, devised in the words : “ I give and devise to *Elizabeth Whalley*, all that my capital mansion-house, wherein I now live, and the lands and grounds thereto belonging, and therewith held and enjoyed, with the appurtenances ; and also all that my manor or lordship of *Chipley*, and all other my manors or lordships, messuages, farms, land, tenements, hereditaments, and premises, whereof I have a disposing power ; to hold the same to the said *Elizabeth Whalley*, for and during the term of her natural life ; and after her decease, I give and devise my said capital mansion-house, &c., to *John Nurton*, his heirs and assigns for ever. And it is my express will and desire, and I do hereby direct, that the said *John Nurton* shall hold and enjoy my said capital mansion-house, with the appurtenances, for the space of one year next after my death.” The testator, for many years previous to, and at his death, occupied all the land (the subject of the ejectment) with his capital mansion-house, and the gardens and pleasure-grounds of *Chipley*. It became a question, whether this land, or any of it, passed to *John Nurton*, by the clause in the will, which directs that he is to have the mansion-house, with the appurtenances, for a year after the testator’s death ; and all the Court determined, that,

(a) Cro. Car. 57.

excepting the orchards, it did not pass. By the Chief Justice, *Eyre*, it was said: "I have no doubt upon the case, unless it be with respect to the orchards. Lands will not pass under the word appurtenances taken in its strict technical sense: they will pass, if it appears that a larger sense was intended to be given to it. Every testator ought to be supposed to take legal words in a legal sense, unless, according to the marginal note to the case in *Hobart* (a), there be demonstration plain of an intent to use them in a different sense. In the former part of the will, there is a devise of a house with lands, in terms express, to which is added, "with the appurtenances," in order to comprise all which might not fall within the description. Then follows a declaration, that the defendant shall have, for one year, something which was included in the above devise. The testator must be supposed to have understood what he was talking about. If he had intended to have given the whole, the words were before him, and he ought to have used them. Suppose there had been nothing stated to let us into the intention of the testator, but the mere devise to the defendant, we must have examined what was occupied by the testator; and if we had found a house situated in a park which had always been occupied with it, and was, as it were, an integral part of the thing, this might have proved the intention of the testator to pass the whole together. There, if nothing to the contrary had appeared, we might have supposed the testator to have used the word appurtenances in a sense different from its technical sense; but this is not that case. It is true that the premises were occupied for a considerable time together with the house; but, first, the whole of the premises are not necessarily connected; in the next place, there is here solid ground to argue, that the testator understood the meaning of the

words employed in the devise, having sometimes used the word lands as a part of the description, and sometimes dropt it. The defendant being the testator's executor, and having been his steward, affords a fair ground of argument. The testator gave him the exclusive enjoyment of the mansion-house, 'with the appurtenances,' for one year only, after having devised the mansion-house and lands also 'with the appurtenances,' to Mrs. *E. Whalley*, for her life, with remainder to the defendant. Now with what view was this done? Most probably for the convenience of the defendant in the execution of the duty imposed on him. The general intent, therefore, as collected from the devise, and the relation in which the devisee stood to the testator, does not call upon us to go beyond the strict rule in construing the technical word appurtenances" (a). In *Doe v. Martin*, *Richard Tonson* was seised of a messuage called *Passars*, with a parcel of land thereto belonging, being copyhold of inheritance, under the manor of *Fulham*, in *Middlesex*, in his own occupation. *Matthew Ramsey* was seised of several other copyhold messuages and gardens, adjoining in part to *Passars*; and by indenture of 10th July, 1762, demised to *Tonson* a messuage and two acres of garden, adjoining to *Passars*, for 21 years. *Ramsey* devised all his copyhold estates to his wife, *Juliana Ramsey*, for life. On 18th October, 1762, *Juliana Ramsey*, the widow, demised to *Tonson* several cottages, part of the said copyhold estates, for 99 years, if she so long lived. *Tonson*, on taking the lease of the 10th July, 1762, laid the greater part of the garden thereby demised into his own premises, called *Passars*, and let the rest, together with the messuage, to *Elizabeth Bibby*. He also pulled down the cot-

(a) 1 Bos. & P. 53

tages demised by *Juliana Ramsey*, and laid the scite of them into his own court-yard. In 1767, *Tonson* devised to *Catherine Whitburn*, and her heirs, "all that his copyhold messuage, with all out-houses, gardens, and appurtenances to the same belonging, situate and being at *Fulham*, in the county of *Middlesex*, and then in his possession." "What," inquired the counsel for the plaintiff "is devised? 1. Not the premises let to *Bibby*, for the testator devises only one messuage, and restricts his devise to what was then in his possession. 2. Not the scite of the four messuages, for that cannot pass as appurtenant to an estate held by another title, although it had been used with it; *Yates v. Clincard*, *Cro. Eliz.*, 704; *Archer v. Bennett*, 1 *Lev.* 131." "The consideration," said the Chief Justice *De Grey*, "is, what the testator meant to devise; for that is the rule of construing a will. The case in *Cro. Eliz.* is only that a copyhold cannot be appurtenant to a freehold. And here both are of a copyhold tenure, although held for a different term. And that in *Levinz* says only, that occupying one thing together with another shall not make it legally appurtenant. That also is the case of a deed, and not of a will. And even there it was held, that, if necessary for the use of the principal, the thing so occupied shall become appurtenant. And sure a court-yard is necessary for the use of a house. The testator's plain meaning was, to unite, as far as he could, the scite of the cottages to his house, and to devise all that he so personally occupied; and, therefore, he meant to devise the scite of the four cottages as appurtenant to his house, but not the messuage and lands which he had demised to Mrs. *Bibby*" (a). The point determined in this case seems to be, that land near to, and appropriated to

(a) 2 Sir W. Bl. Rep. 1148.

inseparable use with a house, will, if not against the intention, pass under the word appurtenances in a will, although the land and the house are held by different leases.

Technically, the word appurtenant seems to be a term of various application. The meaning of it, in a particular case, appears to be determined by the description of principal to which it belongs. *Buck v. Nurton* does not decide that a park may not be an appurtenant of the capital mansion-house of a manor; it only decides, that in the particular case, by the intention, it was not. It seems, indeed, to be distinctly stated by the Chief Justice, that, if not against the intention, the word appurtenant will, technically, include a park, on the devise of a mansion-house situated in a park, the park being occupied with it. On the devise of a *house* with the appurtenances, the word appurtenances appears technically to include outbuildings of any kind, a yard, curtilage (*a*), garden, and orchard (*b*); and it may be added, perhaps, any description of property near to the house, and made to be inseparably used with it.

The meaning of the word appurtenances, like every other word in a will, depends, indisputably, in all cases, on the intention. The term has, it is to be admitted, a technical signification; but, clearly, it may be used in an untechnical sense; and if a testator explains his own meaning of it, on the universal principle of intention, that meaning will determine the effect of the devise. This is, besides, a plain inference from the words in *Hearn v. Allen*: "By the bare words 'with the appurtenances,' without other circumstances to declare the testator's intent, lands shall never pass" (*c*). And in *Buck v. Nurton*,

(*a*) See Spelman, Gloss. v. Curtilagium.

(*b*) 1 P. W. 603.

(*c*) Cro. Car. 58.

the Chief Justice stated in terms: "Lands will not pass under the word appurtenances, taken in its strict technical sense; they will pass, if it appears that a larger sense was intended to be given to it" (a). In *Blackburn v. Edgley*, it was objected on the particular devise, "that although the house at *Clapham* passed to the mother for her life, if she would live there, yet only the house and curtilage would pass, and not the land employed for the producing hay and corn, &c." But, by the Court: "It is true that by the grant or devise of a house, *with the appurtenances*, only the garden and orchard will pass with the house; but the devise of a house, *with the lands appertaining*, will pass land. Now the intention of the testator was, that after his death, during the life of his kinswoman, *Ann Edgley*, every thing should be carried on and transacted as it was in his life-time, and this to such a nicety, as that the same number of servants, and even of coach-horses, was to be employed, the same hospitality observed, the same horses used in ploughing the lands; which could not be, unless the lands were to continue as before to be enjoyed with the house. Wherefore, as it seems to have been his intention not to part them, let those lands which were before constantly enjoyed with the house, and the profits whereof were applied to the maintenance of the house, continue to be so enjoyed" (b).

If a person devises simply in the words, I devise my messuage to A.; the appurtenances of it, although not named, will impliedly pass by the devise. A person was seised of a messuage, to which a garden and curtilage belonged, joined together and enclosed with a wall, and there was no way to the garden but through the messuage. He devised the messuage, but did not mention the garden

(a) 1 Bos. & P. 57.

Ongley v. Chambers, 1 Bingham.

(b) 1 P. W. 600, 602. See also

483.

or curtilage, nor say with the appurtenances. It became a question if the garden and curtilage passed ; and it was adjudged that they did pass ; for it was agreed clearly, that a curtilage is a parcel of a house ; and, like a stable or dove-house, will pass in the case of a feoffment without saying with the appurtenances. The Court doubted of the garden, because it is but a place of pleasure ; but it was afterwards resolved that the garden also passed, for it is as well for necessity as pleasure (a). There appears formerly to have been a distinction, in respect to appurtenances, between the words messuage and house ; the latter being considered not to include all the appurtenances implied in the word messuage (b). The modern case, however, of *Doe v. Collins*, seems to have exploded the distinction. It is there held, that on a devise simply of a house, the appurtenances of it impliedly pass with it (c). "The distinction between house and messuage," said Mr. Justice *Ashhurst*, "seems too subtle to be relied on at this time ; for I think that whatever would pass by the one, would equally pass by the other" (d).

SECTION X.

Of the *Description* of the Land devised.

IF land devised is in part correctly, and in part incorrectly described, it should seem the exposition of the will is made simply on the correct description, and the misdescription remains ineffective.

A person devised in the words : " I devise the house or tenement wherein *William Nicholls* dwelleth, called the

(a) *Carden v. Tuck*, Cro. Eliz. 89.

(c) 2 T. R. 498.

(b) *Harg. Co. Litt.* 5 b. (1).

(d) *Ibid.*, 502.

2 T. R. 500.

White Swan, in *Old Street*, to *Henry Gallant*, my daughter's son, for ever." *William Nicholls* occupied only three upper rooms of the house, and other persons occupied the remainder; yet it was determined that the whole house passed by the devise (a). *Peter Blague*, being seised in fee of two houses in *Andover*, the one a corner-house, in the tenancy of *Binson* and *Nott*, the other adjoining in the tenancy of *Hitchcock*, devised his house "called the corner-house, in *Andover*, in the tenure of *Binson* and *Hitchcock*," to *J. S.*, in fee. On the misdescription in this will it was determined, that the corner-house passed by the devise, but not the house adjoining in the tenancy of *Hitchcock*; "for although the corner-house was not in the tenure of *Hitchcock*, but a misprision, yet the devise is good, for it is sufficiently ascertained before, namely, the corner-house in *Andover*. And the addition, in the tenure of *Hitchcock*, although it be not in his tenure, and is a mistake, yet it is but surplusage; and, although false, shall not vitiate the devise, because the devise was of a thing certain at the first, and shall be expounded according as the intent of the parties is apparent" (b). A person devised as follows: "I give to *Katherine*, my wife, all the profits of my houses and lands, lying and being in the parish of *Billing* and *L.*, at a certain street there, called *Broke-street*." The devise was held to be good, although there was no village or hamlet in the county called *Billing*. The land supposed to be devised lay in *Byrling-street* (c). On a devise in the words, "I devise to *J. S.* all those my lands in *Bramstead*, in the county of *Surrey*, in the possession of *John Ashley*;" it appeared the testator had not any lands in *Surrey*, but he had lands in *Bramstead*, in

(a) *Chamberlaine v. Turner*, 447, 473.

Cro. Car. 129.

(c) *Pacy v. Knollis*, 1 *Brownl.*

(b) *Blague v. Gold*, *Cro. Car.* & *Gold*. 131.

Hampshire, in the possession of *John Ashley*. And in an ejectment brought by the heir of the testator, for these lands in *Hampshire*, against the devisee, it was ruled by *Holt*, Chief Justice, that the lands in *Hampshire* would pass by this devise (a). A person devised: "I give and devise to my dear wife my farm at *Bovington* in the tenure of *John Smith*." A part of the farm consisted of six acres of woodland, which the testator kept in his own hands, and were not in the possession of *John Smith*. It was held that the whole farm, including the woodland, passed by the devise. 'It is manifestly intended,' said Lord *Mansfield*, 'that the whole farm should pass by this will; and the testator never thought of any restriction of his devise, but meant these words, 'in the tenure of *J. S.*' only as an additional and fuller description of a thing sufficiently ascertained before' (b). *Thomas Bromley* devised in the words: "I devise to *J. Brittain* and *J. Marshall*, their heirs and assigns, all that my messuage, dwelling-house, or tenement, with all lands, hereditaments, and appurtenances thereto belonging, situate and being in *Blythbury*, in the parish of *Mavesyn Ridware*, in the county of *Stafford*, now in the occupation of *Thomas Willett*, (except one meadow, called *Floodgate Meadow*, containing by estimation two acres, or thereabouts,) in trust," &c. *Mavesyn Ridware* is a parish containing three distinct townships, viz., *Blythbury*, *Hill Ridware*, and *Mavesyn Ridware*. At the time when the testator made his will, and also at the time of his death, his property in *Blythbury* consisted of a messuage and about 19 acres of land. The messuage, and rather more than two acres of land, were in the occupation of *Thomas Willett*. The remainder of the property in *Blythbury* was occupied partly by the testator himself, and partly by other

(a) *Hastead v. Searle*, 1 Ld. Raym. 728. (b) *Goodtitle v. Paul*, 2 Burr. 1089.

persons. *Thomas Willett* never occupied the *Floodgate Meadows*. The devise was held not to be confined to the messuage and land in the occupation of *Thomas Willett*, but extended to all the lands in *Blythbury*, excepting the *Floodgate Meadow*. "I think," said Mr. Justice *Bayley*, "it was the testator's intention, by the devise of his messuage, with all lands, hereditaments, and appurtenances thereto belonging, situate in *Blythbury*, to give all that he had there under one title, excepting the *Floodgate Meadow*, which he particularly excepted; and then the question is, whether the words 'now in the occupation of *Thomas Willett*,' will restrain the other description. But if they were so construed, the exception would be altogether nugatory; and, therefore, that exception shews that he meant to pass something more than what was in *Thomas Willett's* occupation" (a). *Goodtitle v. Southern*, was an ejectment for two closes of land in the parish of *Darley*, in the county of *Derby*. It arose on the following devise, in the will of *Richard Southern*: "I give and devise all that my farm, lands, and hereditaments, called *Troques-farm*, situate within the parish of *Darley*, in the county of *Derby*, now in the occupation of *A. Clay*, to my brother *John Southern*, his heirs and assigns, for ever." The two closes in question were proved to be a part of *Troques-farm*. They were not, however, in the occupation of *A. Clay*, but of one *Marsden*. Yet they were held to be included in the devise. By Lord *Ellenborough*: "The testator was mistaken as to the person in whose occupation the two closes were; but the devise is sufficiently comprehensive. It is clear that he meant to pass all which was called *Troques-farm*, which is a plain and certain description; and the defective description of the occupation will not alter the devise" (b). *Doe v. the Earl of Jersey*

(a) *Marshall v. Hopkins*, 15 East, 309.

(b) 1 M. & S. 299.

was an ejectment to recover lands in the county of *Brecon*. It arose on the will of a testatrix, who devised as follows: "I devise all that my *Briton Ferry* estate, with all the manors, advowsons, messuages, buildings, lands, tenements, and hereditaments thereto belonging, or of which the same consists, with the appurtenances, unto *Thomas* Earl of *Clarendon*, for his life; and after his decease, to the second son of *George Bussy Villiers*, Earl of *Jersey*, and his heirs. Also, I give and devise my *Penlline Castle* estate, which, as well as my *Briton Ferry* estate, is situate, lying, and being in the county of *Glamorgan*, in the principality of *Wales*, with all the manors, &c., thereto belonging, unto Mrs. *Emily Guinett*, and her heirs, for ever." It appeared by evidence, that *Briton Ferry* is a parish in *Glamorganshire*, and that the lands, called by the testatrix the *Briton Ferry* estate, lay, part, comprising the whole parish of *Briton Ferry*, in *Glamorganshire*, and part in the county of *Brecon*. The ejectment was brought on the ground that the first devise of 'all my *Briton Ferry* estate, with all the manors,' &c., was qualified and explained by the devise of the *Penlline Castle* estate, and the recital, that that and the *Briton Ferry* estate were situate in the county of *Glamorgan*. But it was determined, that the lands in the county of *Brecon*, proved to be a part of the estate called by the testatrix the *Briton Ferry* estate, passed by the devise, as well as the other part of the estate which lay in the county of *Glamorgan*. "Here," said Lord *Ellenborough*, "there is a clear devise, by name, of the *Briton Ferry* estate, and no case has been cited to shew that it is not sufficient to describe an estate by its aggregate name; and, therefore, I have no doubt that the whole of the *Briton Ferry* estate passed by this description in the will." And Mr. Justice *Bayley*: "I have always taken the rule to be, that where

a testatrix has sufficiently described the property intended to be devised, so as to leave no fair ground for doubt as to the property, that then the addition of another circumstance, with a view to identify it, will not limit and restrain the first devise, unless it clearly appears that the testatrix so intended it. That rule will be found in *Dowtie's* case (a), and in *Doe v. Greathed* (b). Now, if that rule be applied to the circumstances of this case, it will stand thus: The testatrix has an estate, partly situate in the county of *Glamorgan*, and partly in *Brecon*, which, for many years before her will, had been known by the name of the *Briton Ferry* estate, part of it being situate in the parish of *Briton Ferry*, in which parish the testatrix had no manor, and only one advowson. Then she devises 'all that my *Briton Ferry* estate, with all the manors, advowsons, messuages, &c., thereto belonging, or of which the same consists.' It is, therefore, clear, that this devise cannot be confined to that part of the *Briton Ferry* estate situate within the parish of *Briton Ferry*; for the testatrix speaks of manors and advowsons, and in that part of the estate there was no manor, and but one advowson: the devise, therefore, must extend to the whole of the *Briton Ferry* estate. Then there is in the will a subsequent devise of the *Penlline Castle* estate, in which there is an addition to the description of the *Briton Ferry* estate, which is applicable only to part of it, and which is, quoad the residue, a false description; and the question then arises, whether this will limit or narrow the prior devise. Now there does not appear on the face of the will any such intention on the part of the testatrix; and, if so, then provided the words of the former devise admit of no reasonable doubt, the addition of these latter words will not vitiate it. Now, do the words of the former devise admit of any fair doubt?

(a) 3 Co. 10 a.

(b) 8 East, 103.

The words 'all that my estate' must mean an entirety, and there is no entire estate called the *Briton Ferry* estate, which is confined to the county of *Glamorgan*. The words, therefore, of the first devise being clear are not to be confined, by the subsequent description in the will, to that part of the estate which is within the county of *Glamorgan*" (a). In *Banks v. Denshire*, a testator devised: "I give all and every my freehold and copyhold messuages, lands, tenements, and hereditaments (having surrendered the copyhold parts thereof to the use of my will) situate, lying, and being in *L.*, to [testator's daughter] and the heirs of her body; and the said copyhold part thereof shall be subject to the payment of 400*l.* mortgage, which is on part thereof. And as well the said freehold as the said copyhold estate shall be subject to an annuity of 50*l.* to [testator's son and heir, the defendant] for life." The testator had two copyhold estates in *L.*; one of which he had surrendered to the use of his will, the other not. On a bill filed by the devisee against the heir at law of the testator, the question was, whether the defect of surrender of part of the copyhold should be supplied against the son and heir of the testator. For the heir, it was argued that it should not from the intent of the testator to devise nothing but what was surrendered.—"I think," said Lord *Hardwicke*, "there are words sufficient to take in this copyhold estate; the description being as large as possible to take in the whole; and what is to confine it is in a parenthesis, and in nature of a recital; therefore, not like words containing a description. This, therefore, differs from the case cited [*Gascoigne v. Barker*, 3 Atk. 8], which was determined by me with great reluctance; the relative pronoun 'which' there making it restrictive. Suppose the testator had begun with the recital, that 'whereas I have surrendered,' &c., in which he had been mistaken; yet the words of the grant should

(a) 1 Barn. & A. 550.

have had their full effect. But the latter words sufficiently shew his intent to give the whole; describing it as part of what he before devised, and shewing he meant to give more than the part subject to the mortgage; and he had no other copyhold except that in question; which therefore comes within the description, and the defect of surrender must be made good" (a). In *Rumbold v. Rumbold*, Sir Thomas Rumbold devised in the words: "I devise all other my estates, as well copyhold as freehold (the copyhold part thereof having been previously surrendered to the use of my will), whereof I am seised in fee-simple, to" [trustees, on several trusts in favour of testator's wife and children: the only trust for his eldest son and heir being an annuity of 300l. for life, remainder to his wife and children]. The testator was seised in fee of copyhold lands holden of the manor of *Sacomb*, according to the custom of the manor, and had no other copyhold estate. He had not surrendered his copyhold estate to the use of his will, and it appeared he had never been admitted. On a bill filed against the heir at law of the testator, who had procured himself to be admitted to the copyhold estate, the statement in the will, that the copyholds had been surrendered, was held to be a mistake, and the heir was decreed to elect. Lord *Loughborough*: "The question is only whether Sir Thomas Rumbold meant to devise this estate. It is not a question whether the Court is to supply a surrender. The interpretation for the heir cannot possibly be consistent with the words: what is contended for him is, that the testator had reference to a future surrender. The words negative the conclusion that he meant to surrender. They intimate distinctly, that he supposed himself to have previously surrendered. That he had not done. It is nothing more than a mistaken description" (b).

(a) 1 Belt's Ves. sen., 63. Banks v. Denshaw, S. C., 3 Atk. 585. (b) 3 Ves: 65.

THE cases, which have been mentioned (a), appear to establish, that if in a devise, the land is in part correctly, and in part incorrectly described, the misdescription is ineffective; but it should seem, if land is devised by a description which is not incorrect, one part of the description may narrow the extent of the other.

Doe v. Bell was an ejectment to recover certain copyhold premises, called *Reads* and *Greens*, in the parish of *Gillingham*. *E. Read* being seised of the two copyholds, called *Reads* and *Greens*, surrendered them to his son, *W. Read*, in fee, who was accordingly admitted. *W. Read*, being seised of these two copyholds, and also of two other copyholds in *Gillingham*, called *Maddocks* and *Langham*, which two last were devised to him by his father, *E. Read*, and all of which he had previously surrendered to the use of his will; and being also seised of a freehold, and possessed of a leasehold estate at *Gillingham*, both of which last were also devised to him by his father; devised:—"As to, for, and concerning all my freehold, copyhold, and leasehold estates, situate in the parish of *Gillingham*, and which I became entitled to on the decease of my father, having previously surrendered all my said copyhold messuages, lands, &c., to the use of my will, I give and devise the same to," &c. On this will it was determined, that the two copyholds called *Reads* and *Greens*, which had been surrendered to the testator in his father's life-time, did not pass by the devise. By *Grose, J.*:—"The devisor died seised of the copyhold estates which had been surrendered to him in his father's life-time, and of other copyholds to which he became entitled on his father's death; and in devising the estates which he meant to give to the defendants, he described them as the estates 'to which he became entitled on the death of his father;' but that

(a) See also *Windham v. Windham*, 3 Dyer 376 b; 3 Co. 10; and Hob. 171.

devise cannot include the other estates, which he had in his own right in his father's life-time" (a). *Doe v. Par-kin* was an ejectment to recover, amongst other premises in *Thurgoland*, in the county of *York*, the *Tontine Inn*, and nine acres of land. It was occasioned by the following devise:—"I devise all my messuages, tenements, lands, grounds, hereditaments, and premises, situate at or in the township of *Thurgoland*, in the parish of *Silkstone*, and county of *York*, and now in my own occupation, with the appurtenances, to" &c. The testator, at the time of making his will, was seised in fee of a messuage and five acres of land, called *Spring House*, in his own occupation; and the testator was also, at the time of making his will, seised in fee of the inn called the *Tontine*, and nine acres of land, but which inn and nine acres of land, at the time of making his will, were not in his own occupation. The court of Common Pleas determined that the words in the will, 'and now in my own occupation,' were clearly restrictive (b). *Gascoigne v. Barker* is also a case in which a description of land in a devise has been held to be narrowed by words of farther description. The devise in this case was in the following words:—"I give to my son *Henry* all my lands, tenements, and hereditaments, in possession and reversion, freehold and copyhold, in the parish of *Chiswicke*, or elsewhere, in the county of *Middlesex* (which copyhold lands I have surrendered to the use of my will), to him and his heirs." It appeared the testator at the time he made his will was seised of a copyhold house, which was an inn, called the *King of Bohemia's Head*, at *Turnham Green*. Three parts of the house were in one manor, and one in another manor. Before the will was made, the testator had surrendered to the use of his will only in the manor under which the three parts were

(a) 8 T. R. 579.

(b) 5 Taunt. 321.

held (a). By Lord *Hardwicke*: "The question is, whether the words in the parenthesis are to be taken as restrictive of the first words of the devise; and I can take them no otherwise. This is the case of lands devised by general words: if, instead of this, the testator had said, I give my messuages with the appurtenances, called the *King of Bohemia's Head*, that would have been a different case, and I should have thought the subsequent words a mistake only in the description. But, when a man does not make a certain definitive description, it is very difficult for Courts of justice not to construe the subsequent restrictive words as explanatory of the former. An observation has been made on its [the mention of the surrender] being in a parenthesis; that the sentence, for this reason, is independent and complete without it, and therefore this may be rejected as superfluous. It is true, with regard to the niceties of grammar, the observation may be right in some instances: but, in legal cases, a parenthesis is not to be rejected. Besides, there are many instances in the common kind of writing, where commas only are used instead of a parenthesis; therefore this may be laid out of the case. But, what makes it still stronger, there is a plain reason here for a parenthesis: because, in the former part of the devise, the testator had coupled the words copyhold and freehold together, and therefore he was under a necessity of throwing it into a parenthesis, with the repetition of the word copyhold. The great objection, and which has some weight, is, that there is part of the same inn, or house, which has been surrendered: and if the testator had described it by name, I should have been of opinion the whole would have passed, although part only had been surrendered. But it appears, by the surrenders

(a) See 1 Ves. 63.

themselves, which were made at different times, that part of the inn was not bought till some time after the first surrender; and therefore this fact clears up and explains the intention of the testator. So that the Court must make so many stretches here, in order to disinherit the customary heir, that it is much better to let the words have their plain and obvious meaning, although the defendants are younger children, and claim the lands as a provision" (a). It is observable, so closely do the words (which state the surrender to have been made) used in the will in *Gascoigne v. Barker* resemble the words of the testator in *Banks v. Denshire*, that the two cases might appear distinguishable only in their opposite results. In *Banks v. Denshire*, the words used are, 'having surrendered the copyhold part thereof to the use of my will:' in *Gascoigne v. Barker*, 'which copyhold lands I have surrendered to the use of my will;' and, in both cases, the words are in a parenthesis. But *Gascoigne v. Barker* seems to have been determined on the opinion, that, in the will in that case, there was not a mistake in the description. It therefore, in substance, appears not to oppose *Banks v. Denshire*, and the other authorities, from which it has been collected, that if in a devise, land is in part correctly, and in part incorrectly described, the exposition of the will is made simply on the correct description, and the misdescription remains ineffective.

ON a devise in the words, I devise my estate of A., a local name; or, I devise my estate at A.; it appears the devise is interpreted to be of land strictly at the place

(a) 3 Atk. 8.

named, and will not pass other lands out of *A.*, although they are near to the same estate, and are a part of it. It farther appears, that collateral evidence is inadmissible to prove that, in the mind of the testator, the lands out of *A.* were a part of the estate of the name, and that he intended to include them in the devise.

Doe v. Oxenden was an ejectment by the heir at law of Sir *John Chichester*, bart., who died seised in fee as well of the premises in question, which composed his maternal estate, as of other property which he derived from his father. The premises claimed consisted of the manors of *Ashton*, *George Teign*, and *Stowford*; the tithes impropriate of the parish of *Nether Ex*; and two estates called *Great* and *Little Bowley*, in the parish of *Cadbury*, in the county of *Devon*. The manor of *Ashton* is situate in the parish of *Ashton*, with the exception of one insulated estate, parcel thereof, which lies in the parish of *Exminster*, adjoining to the parish of *Ashton*. The manor of *George Teign* is situate in *Ashton* parish. Of the manor of *Stowford*, one part lies in the parish of *Crediton*, and the other in the parish of *Sandford*; the manor itself being distant from the parish of *Ashton* about 12 or 13 miles. The parish of *Nether Ex* is also about 11 or 12 miles, and the parish of *Cadbury* 15 miles, distant from the parish of *Ashton*. With the premises aforesaid, are comprised, besides the manor of *Ashton*, the Barton of *Ashton* and lands lying within the parish of *Ashton*. Sir *John Chichester* devised in the terms following:—"I give my estate of *Ashton*, in the county of *Devon*, to *George Chichester Oxenden*, second son of Sir *Henry Oxenden*, bart., of *Broom*, in the county of *Kent*." On the trial at the assizes, a variety of collateral evidence was offered and admitted to prove, that by the words "my estate of *Ashton*," the testator did not mean

to confine the devise merely to the lands in the parish of *Ashton*, but intended to dispose of the whole of his maternal estate before specified. The point of the admissibility of the evidence came afterwards before the Court of Common Pleas, where Sir *James Mansfield*, who delivered the judgment of the Court, after recapitulating the case, and advertng to the evidence, added ; “ If this evidence ought not to be received, the consequence will be, that so much of the property only will pass, as is not affected by the evidence. I have doubted much upon it. On the whole, I rather think we should go further in receiving this evidence, than any case has yet gone. There is an extreme jealousy in receiving evidence to explain written instruments. Many cases have been cited. In general, they are well known. The last and strongest was *Doe v. Brown* (a). There it was impossible to doubt what the testator meant. In this case, my own judgment only is, if the evidence were admitted, that the testator meant to devise the whole of his maternal estate to his maternal relations, and not only the land locally situated at *Ashton*. But to decide in favour of this evidence would be going further than any Court has yet gone. I need not particularize the cases ; of devises where there were two persons of the same name ; where the name, by which property was devised, applied equally to two estates. Such was the case in *Peere Williams*, of a devise to *Gertrude Yardley*, by the name of *Catherine Earnly*, where there was no such person as *Catherine Earnly* ; the case in *Ambler*, of legacies to *John* and *Benedict*, sons of *John Sweet* ; he had two sons, the name of one was *Benedict*, but the name of one was *James* ; the evidence was received. It is not expressly said in any of these cases, that it was necessary to receive the evidence, in order to give

(a) 11 East, 441.

effect to the will, which would not operate without such evidence. But although this is not said, yet the rule seems to hold. It will be found that the will would have had no operation unless the evidence had been received. Here, without the evidence, the will has an effective operation; every thing will pass under it that is in the manor or parish, or what he would naturally call his *Ashton* estate. This will be an effective operation; and this being so, the case herein differs from all the others; because in them the evidence was admitted to explain that, which, without such an explanation, could have had no operation. It is safer not to go beyond this line. Therefore only those premises pass which are in the manor or parish of *Ashton*; for all but them the plaintiff has a right to recover" (a). This case has been followed in *Doe v. Greening*, in which *Thomas Wylde*, being seised in fee in remainder, expectant on the several deaths of three persons, of one undivided moiety of a mansion-house, farm, and lands, with the appurtenants, situate at *Coscomb*; and also of one undivided moiety of the manor of *Farmcott*; and of the messuages, farms, and lands, with the appurtenants, situate within the said manor, in the parish of *Gaiting Power*, in the county of *Gloucester*, by his will devised to his son, *R. B. Wylde Browne*, "all the estate and interest whatsoever which I have or can claim, either in possession or reversion, of or in any lands, tenements, and hereditaments, at *Coscomb*, in the county of *Gloucester*; to hold to my son, his heirs and assigns for ever." After the testator's death, and the death of the last of the three lives, *R. B. W. Browne* entered into possession of a moiety of the mansion-house and lands at *Coscomb*, and of the manor of *Farmcott*, and the farms and land within that manor; and afterwards

(a) 3 Taunt. 147. 4 Dow. P. C. 65.

died intestate, leaving a son, the lessor of the plaintiff, who brought this ejectment for the moiety of the manor of *Farmcott*, &c. And in order to shew that this moiety, &c., passed under the devise, the plaintiff offered to give in evidence, that the estate at *Coscomb* formerly belonged to one *Tracy*, who devised it to his grandson in tail, with a direction that his trustees should lay out the rents and profits, during the minority of his grandson, in the purchase of land near to *Coscomb*, and settle the same; in pursuance of which, the trustees, in 1749, purchased the manor of *Farmcott*; and the two estates had ever since been united and enjoyed as one estate. The learned Judge on the trial rejected the evidence, being of opinion, that as it appeared the testator had lands at *Coscomb*, which was sufficient to satisfy the devise, evidence was not admissible to shew, that he intended to devise other lands not at *Coscomb*. On a motion for a new trial upon the rejection of this evidence, a difference was proposed, on the part of the plaintiff, between this case and *Doe v. Oxenden*; that the evidence in the present case related to property near to *Coscomb*, whereas in *Doe v. Oxenden*, the evidence related to estates, most of which were at a considerable distance from *Ashton*. Lord *Ellenborough* inquired of the counsel, the present learned *Chief Justice* of the King's Bench, if he had any authorities, to which he answered, that he had searched in vain; whereupon his Lordship observed, "that the word 'of' was certainly a word of more general description than 'at'; and, without some authority, the Court could not permit it to be agitated that a word, properly denoting local description, and not general description, could have a different sense given to it by the admission of evidence." *Dampier*, J., added, that "nothing could be plainer than what the testator, in *Doe v. Oxenden*, meant by his estate of *Ashton*, if the evidence

had been admissible, for he called all his maternal property his *Ashton* estate"(a).

Doe v. Lyford(b), is a farther case to the same purpose (c).

There is a distinction between a devise in the words, 'I devise my estate of or at A.,' and a devise in the words, 'I devise my A. estate'. If a person devises an estate by a name, which is not, besides, the name of the place where the estate lies, collateral evidence is admissible to prove of what lands the estate consists (d). So, on a devise of the A. estate, although A may be a local name, as the name of a parish, it may also be accepted to mean the name of the estate, and collateral evidence is admissible to prove, that lands, which are not in the parish of A., are a part of the estate A., and, if proved to be a part of it, they will pass under the devise of the A. estate. In *Doe v. the Earl of Jersey*, a testatrix devised in the words, "I devise all that my *Briton Ferry* estate, with all the manors, advowsons, messuages, buildings, lands, tenements, and hereditaments thereto belonging, or of which the same consists, with the appurtenances." *Briton Ferry* is a parish in the county of *Glamorgan*, and part of the estate lay in the parish; and yet it was held, that not only lands which were not in the parish, but lands which were a part of the estate, although in another county, passed under the devise (e). But, it should seem, had the devise, in that case, been in the words, I devise my *Briton Ferry* estate, in the county of *Glamorgan*; on the principle of *Doe v. Oxenden*, the part of the estate out of the county would not have passed by the devise, which would then have been confined to the county in which the testatrix described the estate to be (f).

(a) 3 M. & S. 171.

(b) 4 M. & S. 550.

(c) See also *Whitbread v. May*,
2 Bos. & P. 593.

(d) *Heigham's Case*, Godb. 16.
Goodtitle v. Southern, 1 M. & S. 299.

(e) 1 Barn. & A. 550.

(f) *Ibid*, 557.

SECTION XI.

Of Devises by Tenants for Years.

A TERM of years is personal property. Personal property acquired after the publication of a will, may, and, *primâ facie*, will pass under a general bequest of personalty in it. *Primâ facie* it is presumed to be intended to pass. If, then, a person makes a general bequest of personalty, but, at the time he makes his will, is not possessed of land for a term of years, but afterwards takes a lease for years, and dies possessed of it, the land held under the lease, although taken after the publication of the will, will pass under the general bequest in it. It appears, also, if a tenant for years bequeaths personal property generally, and, after the will is made, the lease expires and he renews it; the land held under the new lease for years will pass under the general bequest of the personalty in the will published before the new lease was taken.

In *Wind v. Jekyl*, it is said by the Lord Chancellor *Macclesfield*: "A devise of a lease for years differs from a devise of a freehold or fee-simple. For instance, one cannot devise fee-simple land, which he has not at the time of making the will; but leases [for years] or personal estate, although they were not the testator's at the time when he made his will, yet, if they be his at the time of his death, they shall pass by the will. Therefore, if one devises all his real and personal estate, and afterwards acquires more of each kind, the real estate acquired afterwards shall not pass; *secus* as to the personal estate" (a). In *Stirling v. Lydiard*, there was a devise in the following words: "As to all and singular my leasehold estate, goods,

(a) 1 P. W. 575; see *ibid*, 424; also 1 Salk. 237, 238; and *Adean v. Templar*, cited 3 P. W. 168.

chattels, and personal estate whatsoever, I give to my daughter *Johanna*; and, if she dies without issue living, then," &c. In the residuary clause, [which bequeathed the residue to testator's daughter] he repeated the words "all and singular," &c. After making the will, the testator renewed a lease with the Dean and Chapter of *Windsor*. *Johanna* died without issue, and her husband, as administrator and representative of his wife, brought his bill to have the renewed lease; insisting that the renewal by the testator, after making the will, was a revocation, and that, consequently, he, in the right of his wife, was entitled to it. Lord *Hardwicke*: "There is no doubt but the leasehold estate passed by the will. The plaintiff goes upon a mistake, that this is a *specific* legacy. It is nothing like it, for it is only an enumeration of the several particulars of his personal estate, but yet is a *general* devise of the whole. Suppose the testator had purchased a new lease, would not that have passed? Why, then, should not a new term in a lease equally pass? If I was to construe this a revocation, I do not know but, if a man was to give all his *Bank, East India, and South Sea* stock, and should afterwards turn it into money, it might as well be insisted this was a revocation" (a).

It is in the power of a person prospectively to devise a lease for years, which he may be possessed of at the time of his death (b); but if a tenant for years devises in the words, I devise my lease to A.; and the lease is determined before his death, the devise ceases with the lease; and if the testator takes a new lease for years, such renewed lease will not pass under the will, unless it is repub-

(a) 3 Atk. 199. See also 2 (b) 6 Madd. Rep. 84.
Atk. 599.

lished (a), or there are other words in the will which prove the devise in it to be prospective. These points appear from the case of *Sir Thomas Abney v. Miller*, in which a testator devised in the words, "I devise all my college leases which I now hold of *Magdalen College*, to my mother, *Mrs. Elizabeth Burton*"(b). [In trust for sale, and to divide the money]. Several years after making the will, the testator surrendered the college leases devised by it, and accepted two new leases of the same premises, and paid large sums of money by way of fine. By Lord *Hardwicke*: "I will consider the question, in the first place, as if it had been an express legacy, or gift of the term, to the three *cestuis que trust*. For, suppose he had said, 'I give and bequeath both the leases to my mother, &c., equally, share and share alike,' and afterwards the testator renewed the leases; what would have been the effect in point of law? There is no doubt but, in this case, it would have been an ademption or revocation; and even if the executrix had assented, the legatees could never have recovered the term upon the renewal by an ejectment; for the thing itself is annihilated and gone. It is not in this case a devise of the land, but a devise of the lease, which I hold, &c., of *Magdalen College*, &c. Just as if he had said, I devise the term, and that term is surrendered and gone. Where a testator expresses himself in the present tense, it must relate to what is in being at the time of making the will, and can mean only the first lease, and the term to come in it. The defendant's counsel have compared it to a gift of a ship, or a house which is rebuilt, after the making of the will; but they are different, for this reason, because a ship or house is the same *corpus*; and, in the present case, it is an absolute new term, and the old one is gone. But then some

(a) *Coppin v. Fernyhough*, 2 Bro. C. C. 291.

(b) See 3 Atk. 176.

stress has been laid on its being the common course and method of renewal in bishops' and college leases. This Court does regard the custom of renewal in some cases, because if such an estate is given upon trust, and the estate so given is renewed after the death of the donor, yet the Court considers it as governed by the old trusts, with respect to persons claiming under the testator; and the executor renewing would have been bound by the trust: but this will not extend so far as to bind the testator himself, in his life-time, under any trust that he may have created. The same as to freeholds; for if there is an estate for three lives in the testator, and he has devised it; yet if he surrenders these three lives, [this estate], and takes a new lease, this is admitted on all hands to be a revocation. Therefore, I am of opinion, if it had been an express bequest, it would have been a revocation in law. At the same time I agree, if a man had devised a lease, together with a right of renewal, and had done nothing in it himself, that then the expiration of the old term would not have barred the legatee, because the devise carried the right of renewal, as well as the lease itself. As I am clear of opinion this would have been an ademption in law, so must it be here" (a).

In *Carte v. Carte*, the beneficial interest in a lease for years was devised, and Lord *Hardwicke* held there were sufficient additional words in the will to extend the devise to the interest in a renewed lease. The circumstances of this case are particular. *Samuel Carte*, the plaintiff's father, was a prebendary of *Tachbrooke*, to which there is an estate belonging that fell to him in 1714. From that time he demised it to one of his children for 21 years; and the child, that was named lessee, executed a declara-

(a) 2 Atk. 593. See 3 Atk. 176.

tion of trust, declaring that his name was made use of in such lease, in trust for the father for so many years as he should live of the term, and then for such person or persons as he should by deed or will appoint; and, in default thereof, to and among all his children equally. Such lease generally surrendered the lease yearly, and *Samuel Carte* granted a new one. In August, 1735, he leased the prebendal estate to his daughter, *Sarah*, the defendant, who executed a declaration of trust. On the 19th January, 1735-6, *Samuel Carte* made his will; and, after giving some legacies, bequeathed to his eldest son, *Thomas*, the plaintiff, all the rest of his goods, chattels, and estate, whether real or personal, in possession and reversion, and made him executor. Then, by a supplemental clause, he added: "Item, it is my mind and will, that my eldest son, *Thomas*, shall have the disposal of the lease of my prebend of *Tachbrooke*, made to my daughter, *Sarah*, and that he shall receive to himself all the profits and advantages arising and accruing from it." The lease in the year 1735, devised by the will, was surrendered in 1736, and several new leases were made, and the subsisting lease, the lease in question, was dated the 24th September, 1739, and made to the defendant, *Sarah*, who, on the same day, executed a declaration of trust; in trust for the father, for so many years as he should live of the term; then for such person or persons as he should by deed or will appoint; and, in default thereof, to and for the benefit of the defendant, *Sarah*, and every other child of *Samuel Carte*, share and share alike. The 16th April, 1740, *Samuel Carte*, the testator, died. The bill was brought by *Thomas*, the eldest son, claiming the whole benefit of the lease in 1739, and praying that the defendant, *Sarah*, might assign it to him. The defendants, *Samuel* and *Sarah*, said, that the plaintiff was enti-

tled only to a third, for that the lease in 1739 was a revocation of the will, and did not pass by it. Lord *Hardwicke*: "The general question is, whether the benefit of the renewed lease in 1739 passed to the plaintiff by the will of his father in 1735, either by the original will, or subsequent additions to the will. I am clear of opinion the will was sufficient to pass it under the circumstances of this case: the question here arises altogether on the penning of the will, and not from the inability, in point of law, to give it [the lease]. There is no question but a man, by will, may bequeath a term of years which he has not in him at that time, but comes to him afterwards: therefore all these cases of revocations of bequests of terms for years arise from the short penning of the will; and if, in the case of *Abney v. Miller*, the testator had said, I give all the *interest* I have in the lease, there is no doubt but it would have passed. So that there is no question concerning the inability to devise, but the want of a proper form of words. If that is so, and a form of words may be used, which would pass a subsequent renewed interest after making the will; then the question is, whether the words here are sufficient to pass this interest; and clearly they are. I take the construction of the supplemental clause in as extensive a manner as if he had particularly recited and repeated the lease and declaration of trust, and given it to his son, and the effect would have been to have given him the whole trust. What was that? Most certainly not the trust of the then existing term only, but also all the renewals, and extends to all future leases as well as those in being. The devise in this will extends to the whole trust, and the word "advantages" is undoubtedly sufficient to take in all the advantages and benefits belonging to the trust. It comprised not only the profits, but the renewals, which are consequential. The words of the will are very

sufficient to pass not only the trust and beneficial interest then subsisting, but also the renewed lease" (a).

"It is clear," observed the *Vice Chancellor*, in *Colegrave v. Manby*, "that if a testator simply bequeaths a lease, of which he is possessed at the making of his will, and afterwards renews that lease, the legatee is not entitled to the benefit of the new lease; for the new lease is not given to him, but the old lease only, which is adeemed and gone. It is equally clear that a testator may, if he pleases, in the case of a chattel lease, give not only the actual lease of which he is possessed at the making of his will, but such renewed or other lease of the same premises, as he happens to be entitled to at the time of his death. In every case, therefore, where the lease has been renewed by the testator, after the making of his will, the true inquiry is, whether it appears upon the will to have been the testator's intention that the legatee should take, not merely the actual lease, if it subsisted at his death, but any renewed or other lease of the same premises which he might then happen to be possessed of" (b).

As it is in the power of a person prospectively to devise a *lease* for years; so, likewise, a person may, if he pleases, prospectively devise *land* which he may be possessed of for years at the time of his death (c). But if a tenant for years devises land, by any name, as land, messuage, tenement, or the like, and the lease expires before his death, the devise ceases at the end of the lease; and if the testator takes a new lease for years of the same land, the land will not pass under the will, unless, after the lease is

(a) 3 Atk. 174.

11 Ves. 383; 15 Ves. 236; 6

(b) 6 Madd. Rep. 83.

Madd. Rep. 84.

(c) 3 Atk. 176, *James v. Dean*.

renewed, the will is republished (*a*), or, there are farther words in the will which shew the devise in it to be prospective (*b*).

In *Rudstone v. Anderson*, a person devised: "I devise all my lands, tenements, and hereditaments at *Westow*, in *Yorkshire*; and all my tithes and ecclesiastical dues, payable out of *Westow* aforesaid, or any other towns or places near the same." At the time of making the will, the testatrix was seised in fee of an estate at *Westow*, and possessed of a lease of tithes under the Archbishop of *York*. But, after the making of the will, she surrendered that lease, and took a new one, of which she was possessed at the time of her death. "I own," said the Master of the Rolls (Sir *John Strange*), "I cannot see any real distinction between the words in this will, 'all my tithes at *Westow*,' and if it had been, all my lease or interest in that lease at *Westow*; because that must refer to the interest she had at the time of making [the will]. That interest does not remain at the death; for, by the surrender, she so far altered her interest, that what were her tithes, under the lease at making the will, cannot be considered as being the same at the time of her death; but she acquired a new estate in them to commence at, and run out to, a different period of time. The question then is, whether this is in such a light as will sufficiently pass these tithes, her property in which was so greatly altered by the surrender and acceptance of a new lease. Sir *Thomas Abney v. Miller* (*c*), is in point; for it was held, that the lease being thus altered, the interest under the new lease would not pass. There is no difference between that case and

(*a*) *Coppin v. Fernyhough*, 2 C. C. 261. *James v. Dean*, 11 Bro. C. C. 291. Ves. 383; 15 Ves. 236.

(*b*) *Rudstone v. Anderson*, 2 (c) 2 Atk. 593.
Ves. 418. *Hone v. Medcraft*, 1 Bro.

this: There it was mentioned his "estate:" here it is "my tithes," that is, my estate in the tithes: so that, although it may be a little harsh, in a case of this nature, to separate these interests, yet I cannot see how the Court can say, these tithes, under the description in this will, have not received such an alteration in their nature as to require republication of the will. It must then be considered, that the testatrix acquired a new interest subsequent to the will; and consequently they [the tithes] will not pass by the words used, but go into her personal estate"(a). In *Hone v. Medcraft*, a testator devised:—"I also give and bequeath to *Temperance Bedford* the perpetual advowson and disposal of the living or rectory of *Waverdon* for ever; together with the tithes of all sorts thereof." The rectory of *Waverdon* was held by the testator, at the time of the devise, by lease from *New College, Oxford*, for the term of 10 years; and after the will made, he surrendered up that lease, and took a new lease from the college for 10 years more; and was possessed of the rectory by virtue of that lease at the time of his death. By Lord *Thurlow*:—"I have looked over *Abney v. Miller*, and all the other cases on the subject, and I find I must contradict them all, if I do not construe this devise of the leasehold estate, which was afterwards surrendered, to be a lapsed devise: it must be part of the personal estate" (b).

In *James v. Dean*, a lessee for years devised:—"I also give and bequeath to my wife, during her life, all my messuages, lands, and tenements, with the appurtenances in *Vine-street*, in the parish of *Lambeth*, which I hold by lease under Sir *William East*, for all the residue of my term and interest therein; and after her decease, I give and bequeath the same to my godson, *Thomas James*, his exe-

(a) 2 Ves. 418.

(b) 1 Bro. C. C. 261.

cutors and administrators, for all the residue of the term or interest I shall have to come therein at my decease." Lord *Eldon* held, that, by the context, the same lands held under a renewed lease passed by the devise. "I agree," said his Lordship, "that in *Coppin v. Fernyhough*, and *Hone v. Medcraft*, this general principle is established; that where there is a general bequest, in the terms, 'all my leasehold estates,' and the testator afterwards surrenders, and takes a new lease, that is a revocation. But it depends upon the context of the whole will, whether that general doctrine is to be applied. A leasehold interest for years may be disposed of by a will, made before the testator acquired that interest. But the general doctrine is, that you must shew that intention." His Lordship then observed on other bequests in the will; and proceeded, "In the disposition over after the decease of his wife, is not the effect a declaration that he gives all? 'The same,' means 'messuages, lands, and tenements;' not this interest; but all he shall have to come therein at his decease. These words are too plain to be narrowed in construction, so as to say, he meant nothing more than what he had at the date of the will, and that, if he had any interest to come at his decease, he meant to give no part of that, if it was a new term or interest"(a).

SECTION XII.

Of Devises by persons who have both Lands in *fee* and for *years*.

If land is devised by any name given to land, as land, messuage, tenement, or the like, by a person who is seised in fee of land, and is possessed also of land for years; the

(a) 11 Ves. 383; 15 Ves. 236.

devise is interpreted to be of the freehold land alone, and will not pass the leaseholds, unless there is farther evidence in the will, or collateral evidence, which explains the intention to be to extend the devise to them.

Rose v. Bartlett was an ejectment for 40 acres of land, and two acres of meadow, in *Burnham*. A special verdict was found, that *Philip Scudamore* was seised in fee of the land in the declaration, and demised it, by the name of four closes of pasture in *Burnham*, for 100 years, to *Richard Batyne*; and that *Richard Batyne*, being possessed of the land, and being seised in fee of other lands and tenements in *Burnham*, devised in these words:—"I will that my wife *Elizabeth* shall have *Burnhams*, and the lands thereunto belonging, being three half-acres in *Lentfield*. And my will is, if she do marry, my son *Nicholas* shall have *Burnhams*, and three half-acres lying in *Lentfield*. I will and bequeath to my said wife *Elizabeth* all the rest of my lands lying in the parishes of *Burnham* and *Hitchman*, during the time of her life, and afterwards to my son, *Bartholomew*." On this will, "all the Justices, *absente Richardson*, resolved, that if a man hath lands in fee, and lands for years, and deviseth all his lands and tenements, the fee-simple lands pass only, and not the lease for years; and if a man hath a lease for years, and no fee-simple, and deviseth all his lands and tenements, the lease for years passeth, for otherwise the will should be merely void" (a).

Rose v. Bartlett has been followed in the cases cited in the margin (b). In all of them, leaseholds for years were

(a) Cro. Car. 292.

(b) *Davis v. Gibbs*, 3 P. W. 26; *Knotsford v. Gardiner*, 2 Atk. 450; *Pistol v. Riccardson*, 1 H. Bl. 26 note (a); (see *Addis v. Clement*, 2 P. W. 456, & 6 T. R. 353). *Chapman v. Hart*, 1 Ves. 271; *Whitaker*

v. Ambler, 1 Eden. 151; *Thompson v. Lawley*, 2 Bos. & P. 303. (In this case there is an elaborate judgment of Lord *Eldon*, who reviewed the cases which preceded it). 5 Ves. 476, S. C.

held not to pass under the devise which passed the freehold land. The devise, and circumstances in each of these cases, it may be of practical utility here to transcribe.—

In *Davis v. Gibbs*, Lady *Boreham*, being seised in fee of lands in *Kent*, and possessed of a mortgage for years of the manor of *Cranbroke* in *Essex*, and of an extended interest upon a statute in the manor of *Bow-Brickhill* in *Bucks.*, devised all her manors, messuages, lands, tenements, hereditaments, and real estate whatsoever, in *Kent*, *Essex*, *Bucks.*, *Bedfordshire*, or elsewhere within the kingdom of *England*, of which she was any way seised or entitled to, unto her nephew *Henry Davis*, and to her niece *Elizabeth Gibbs*, for their lives, equally, share and share alike; and, after their decease, then the testatrix devised her said real estate to the right heirs of her said nephew *Henry Davis*, and of her said niece *Elizabeth Gibbs*, equally, in equal parts; to hold to them and their heirs as tenants in common. By a farther clause, the testatrix, after several legacies, gave all the rest, residue and remainder of her personal estate, plate, gold, &c., and all her mortgages, bonds, specialties, and credits, whatsoever they should consist of, after her debts and legacies paid, unto her said nephew *Henry Davis*, and her said niece *Elizabeth Gibbs*, equally to be divided between them; and made her nephew and niece executors (a). In *Knotsford v. Gardiner*, *John Colchester*, seised in fee of several freehold lands, and possessed of several leasehold lands in the same parish, devised: “I give, devise and bequeath unto *Martha*, my wife, for life, all my estates in *London*, &c.; and, after her decease, I give, devise and bequeath the aforementioned estates to my daughter *Ann Colchester*, and her heirs for ever. Item, I give and bequeath unto my wife all my goods and chattels, and all other things not before bequeathed; and I make my wife sole executrix (b).” *Pistol v. Riccardson* was an ejectment

(a) 3 P. W. 26.

(b) 2 Atk. 450.

for two leasehold farms in *Cumberland*. The case reserved stated, that one *Christian Riccardson*, being seised in fee of several lands, and also possessed of the two farms in question for the remainder of two terms of 1000 years, devised "all and every of his several lands, messuages, tenements, and hereditaments, whatsoever and wheresoever, whereof he was seised and interested in or entitled to," to his son for life, remainder to the heirs of his body. He then devised his personal estate to his wife and daughter, and made the wife sole executrix (a). In *Chapman v. Hart*, the testator devised "all his lands and tenements in or near *Fowey*," to the plaintiff. In this case, the will was attested by two witnesses only (b). In *Whitaker v. Ambler*, *Richard Whitaker*, being seised in fee of freehold estates in the counties of *Lancaster* and *Chester*, and also possessed of leaseholds for years in *Manchester*, by his will, after giving some small legacies, gave and bequeathed all the rest, residue, and remainder of his personal estate, of what nature or kind soever the same might be, or wheresoever found, unto his wife, *Mary Whitaker*, to her sole and separate use for ever. He also gave and bequeathed all his real estates, wheresoever situate, lying, and being, unto his said wife, *Mary Whitaker*, for and during the term of her natural life; and from and after her decease, he gave and bequeathed the same to trustees, their executors and administrators, on certain trusts; and, subject to such trusts, he gave, devised, and bequeathed all his said real estate to his nephews, *Robert* and *Benjamin Whitaker*, and their heirs for ever (c). In *Thompson v. Lawley*, *Beilby Thompson* being seised in fee of the manor of *Wheldrake*, in the county of *York*, and other real estates, and also possessed of a considerable personal estate, including, among other things, two leasehold houses, one situate at *Putney*

(a) 1 H. Bl. 26, n. (a).

(b) 1 Ves. 271.

(c) 1 Eden, 151.

in *Surrey*, and the other in *Mortimer-street, Cavendish-square*, held on beneficial leases; by his will, after directing that his funeral expenses, debts, and legacies, should be paid out of his personal estate, but, if his personal estate should not be sufficient to pay the same, his real estate should be charged with the deficiency; gave and devised his manor of *Wheldrake*, and all other his manors, messuages, lands, tenements, and hereditaments, to trustees and their heirs, to the uses and for the trusts after-mentioned; that is to say, as to his said manor of *Wheldrake*, and all his other tenements and hereditaments in the parish of *Wheldrake*, in trust for the payment of certain annuities. He then devised as follows: as for and concerning the said manors, messuages, and other hereditaments, so charged with the said annuities; and as for and concerning all other his manors, messuages, lands, tenements, and hereditaments, in the said county of *York*, or elsewhere in the kingdom of *Great Britain*, to the use, &c. [uses in strict settlement]. After several farther devises and bequests, the will proceeds: "Lastly, I give and bequeath all my monies, securities for monies, goods, chattels, and effects, and all other my personal estate, not hereinbefore by me disposed of, to my brother, *Richard Thompson*, and to my sister, Lady *Lawley*, in equal shares and proportions." The testator appointed his said brother and sister executors of his will (a).

In the judgment, in the last case, it is said by Mr. Justice *Rooke*: "My opinion is founded on the case of *Rose v. Bartlett*; which I consider as a rule of property not to be shaken. The cases cited (b) in opposition to the rule have all admitted it, but have proceeded on special

(a) 2 Bos. & P. 303, 5 Ves. C. C. 78. *Addis v. Clement*, 2 P. W. 456. *Lane v. Lord Stan-*
476.

(b) *Turner v. Husler*, 1 Bro. hope, 6 T. R. 345.

circumstances. With respect to the rule itself, Lord *Hardwicke* expressly said, it was not to be departed from; and Lord *Mansfield* held the same doctrine. I cannot agree that the rule has been so far shaken, that the *onus* is to be thrown on the personal representative of shewing that the leaseholds are not intended to pass: on the contrary, I think that the leaseholds must be taken not to pass, unless special circumstances can be shewn clearly demonstrative of a contrary intent"(a).

THE rule in *Rose v. Bartlett* is a rule founded on the intention(b) of the testator. Clearly, if it is the intention to pass leaseholds for years with the lands held in fee, the rule will not apply. It has been considered, on the intention, not to apply in several instances(c). In *Addis v. Clement*, *Thomas Addis*, seised in fee of land, and possessed of a lease for 21 years held of the church of *Hereford*, and other lands in *D.*, all in the possession of *A. and B.*, tenants at certain rents; and it being by reason of the long unity of possession very difficult to distinguish the fee-simple from the leasehold premises; devised all his messuages, lands, and tenements, in the parish of *D.*, which he then stood seised or possessed of, or any ways interested in, and which were in the possession of *A. and B.*, to his wife, *Jane*, for life, remainder to his brother, *James Addis*, and the heirs of his body, if then living; remainder, if his brother *James* were then dead, or should die without issue, to the plaintiff, *John Addis*, for life, with a power to make a jointure; remainder to trustees to support, &c.; remainder to the first, &c., son of the plaintiff, *John Addis*, in tail-male successively; remainder to the testator's sister, *Eleanor Bradshaw*, for life; with

(a) 2 Bos. & P. 319.

(b) *Ibid*, 312, 318.

(c) *Addis v. Clement*, 2 P. W.

456. See 6 T. R. 353, 354. Hart-

ley v. Hurle, 5 Ves. 540. Dixon

v. Dawson, 2 Sim. & St. 327.

Slawin v. Farside, *ibid*. S. C.

remainder to her first, &c., son, in tail-male; remainder to the testator's brother-in-law, *Thomas Delahay*, in fee. And all his goods and chattels, money, and personal estate, were bequeathed to his wife, *Jane Addis*, who was also made executrix. Against the plaintiff it was objected, that the leasehold premises, especially for so short a term as 21 years, could never have been intended by the testator to pass either for life or in tail, or to trustees to preserve contingent remainders; neither could it be supposed the testator thought of empowering the plaintiff, the devisee for life, to make a jointure thereof; and that here being some fee-simple lands which would satisfy the words, the leaseholds should be included in the bequest of the personal estate to the wife. By the Lord Chancellor *King*: "The question upon this will of *Thomas Addis* is, whether the leasehold passes with the freehold. I must own the limitations are improper; but then, the words of the will are very strong; all the lands which the testator was 'seised or possessed of, or any ways interested in,' which words 'possessed of or interested in,' properly refer to a leasehold estate, and distinguish the present case from that of *Rose v. Bartlett*, where the words 'possessed of or any ways interested in,' are not to be found. And as this lease for 21 years was held of the church, and was always renewable, the testator might look upon himself, from the right he had to renew, as having a perpetual estate therein, a kind of inheritance; and, therefore, the leasehold premises ought, I think, to pass by this will"(a). In *Hartley v. Hurle*, a person gave, devised, and bequeathed all his messuages, lands, tenements, and hereditaments, whatsoever and whosoever, to (trustees) their heirs, executors, administrators and assigns, according to the several and respective estates and interests therein, upon trust out of the rents,

(a) 2 P. W. 456.

issues, and profits of his said messuages, lands, tenements, and hereditaments, to pay, &c. [various trusts]; and upon farther trust, to pay all the rest and residue of the said rents, issues, and profits (subject to ground-rents and other out-goings in respect to his said messuages, lands, tenements, and hereditaments), to, &c. The Master of the Rolls (Sir *Richard Pepper Arden*): "The first words 'messuages, lands, tenements, and hereditaments,' alone, certainly would not pass a leasehold estate; but I am clearly of opinion, that what follows is sufficient. He gives his messuages, lands, tenements, and hereditaments, to the trustees, their heirs, executors, administrators and assigns, according to the several and respective estates and interests therein; and the word 'ground-rents' puts it out of all doubt" (a).

It should seem, farther, that leaseholds for years will pass by the same clause which devises the fee-simple lands of the testator, if they appear to be *separately* named by any word in the devise. In the following cases, they have been understood to be separately named by the words 'mines,' 'rents,' and 'farms.' In *Lowther v. Cavendish*, Sir *James Lowther*, being seised in fee of a large real estate, and possessed of leasehold estates in *Cumberland*, on which he had several coal and lead mines, gave and devised all his manors, messuages, lands, tenements, mines of coal, lead, and all other mines, rectories, advowsons, tithes, rents, and hereditaments whatsoever, situate, lying, and being within the county of *Cumberland*, to Sir *William Lowther* [in strict settlement]. The testator, lastly, bequeathed all his goods, chattels, and personal estate, not otherwise disposed of, to Sir *William Lowther*, whom he appointed sole executor. The testator's estates in *Cumberland* consisted both of lands of inheritance, and of

(a) 5 Ves. 540.

collieries and lands held under sixteen different leases from various persons. On this will and the circumstances, the Lord Chancellor *Northington*, who made many observations on the cases of *Rose v. Bartlett*, and *Addis v. Clement*, decided principally on the words 'rents' and 'mines of coal' in the devise, "that the leaseholds passed entailed with the other lands to Sir *William Lowther*, and not by the residuary clause, or the constituting him executor" (a). In *Lane v. Earl Stanhope*, a testator was seised in fee of freehold messuages, lands, and hereditaments in the counties of *Kent*, *Essex*, and *Surrey*; and particularly of 230 acres of land, part of a farm in the parish of *Buckland*, and *Buckland Dane*, in *Kent*; which farm contained 390 acres, of which the 230 mentioned were freehold. And he was possessed of 160 acres, the residue of such farm, under a lease from the Archbishop of Canterbury for 21 years, which lease was renewable. The whole of the farm, as well the leasehold as the freehold parts of it, was at the time of making the will and of the death of the testator, in the occupation of *Ingram Bromley*, as his tenant; and was held by *Bromley*, and had been as far back as could be discovered, held by former tenants, as one entire farm, without any distinction as to any part of it being freehold or leasehold. The testator, being so seised and possessed, devised in the words: "I give and devise all my manors, messuages, or tenements, houses, farms, lands, wood-lands, hereditaments, and real estate, whatsoever and wheresoever, to *Richard Bettinson*" [in strict settlement]; all the rest and residue of my ready money, rents in arrear, and personal estate whatsoever, I give and bequeath to the said *Richard Bettinson*, whom I do hereby make and appoint sole executor and residuary

(a) 1 Eden, 99. Amb. 356.

legatee." Principally on the word 'farms' in this will, it was determined that the leaseholds for years passed under the devise of the lands of inheritance (a).

SECTION XIII.

Of Devises by Persons who have both freehold and copyhold Lands.

A DEVISE of copyholds is an appointment of a use. The Stat. of Wills, 32 *Henry VIII.*, c. 1, does not extend to copyholds; nor, by the common law, are they, by particular custom, devisable, excepting by way of appointment in pursuance of a surrender to the use of the will. Before the statute 55 *George III.*, c. 192, a will of copyholds was at law, and, excepting particular cases, in equity also, ineffective without the surrender (b). That act makes the surrender simply unnecessary. It neither invalidates the surrender if made, nor empowers a copyholder to make a will. A will of copyholds is still an appointment (c).

If land is devised by any name given to land, as, land, messuage, tenement, hereditament, or the like, by a person who has both freehold and copyhold lands; it should seem, that the devise is always at law, and, excepting the single instance of a devise for payment of debts (d), in equity also, interpreted to be of the freehold land alone, and will not pass the copyholds, unless there is farther evidence in the will (e), or collateral evidence, which explains the intention to be to extend the devise to them (f).

(a) 6 T. R. 345. See 9 Price, 577.

(b) *Milbourn v. Milbourn*, 2 Bro. C. C. 64.

(c) *Noel v. Hoy*, 5 Madd. 38.

(d) *Sampson v. Sampson*, 2 Ves. & B. 337.

(e) *Doe v. Earl Lucan*, 9 East, 448

(f) *Hawkins v. Leigh*, 1 Atk. 387. *Byas v. Byas*, 2 Ves. 164. *Judd v. Pratt*, 13 Ves. 168; 15 Ves. 390. *Hodgson v. Merest*, 9 Price, 556.

In *Hawkins v. Leigh*, a person devised in the words :—
 “As for my worldly estate and goods, I dispose thereof as follows; videlicet, In regard a great part of my lands are already settled, and the great tenderness and affection, and prudent management I have always found in my wife *Catherine*; for the kindest return and acknowledgment, therefore, I give all my lands unsettled, and all my goods and chattels of what nature and kind soever, to my said wife for life, and afterwards to my younger children, in such manner as she shall think fit to dispose of the same.”
 The testator died seised of freehold lands in fee-simple, and also seised to him and his heirs of customary mesuages held of the manor of *H.* and *B.*; and were [that is, both the freehold and copyhold were], unsettled lands, and the latter not surrendered to the use of his will. Lord *Hardwicke* :—“The only question is, as to the copyhold estate, whether it passed by the will; and this must depend upon circumstances. Where there is a general devise of lands, and there is no surrender of the copyhold lands to the use of the will, the construction at law is, that they do not pass by the will; especially, where there are other words which may answer the intention of the testator mentioned in the will; for copyhold lands are not properly the subject of a devise, as they pass by the surrender, and not by the will. I do not think the outset of the will, ‘my worldly estate and goods,’ will carry it farther than the subsequent words, ‘all my lands unsettled, and all my goods,’ &c.; for as the lands settled were only freehold, naturally, the lands unsettled must be of the same kind. Therefore, I am of opinion, upon the words of the will, the copyhold lands will not pass (*a*).” The word ‘*especially*,’ used by Lord *Hardwicke* in this decision, amounts, it is apprehended, to *à fortiori*. The meaning

(a) 1 Atk. 387.

of his Lordship appears to be, that where there is a general devise of land, and there is no surrender of the copyhold lands to the use of the will, at law, the copyholds will not pass: *à fortiori*, therefore, they will not pass, if the testator has freehold lands to satisfy the words of the devise. In *Byas v. Byas*, a person seised of freehold land, and of copyholds of the nature of Borough-English descendible, not only to the younger son, but to the younger daughter, which copyholds were not surrendered to the use of his will, in the introduction to his will desired all his just debts to be paid; then made a provision for his daughters and his wife, and a farther eventual provision for the daughters after the death of his wife; and gave all the rest and residue of his estate, real and personal, of what nature or kind soever the same might be or consist of, at the time of his death, to his wife, her heirs, executors, administrators and assigns. By the Master of the Rolls, Sir John Strange:—"The will stands for consideration on the general expression, 'all the rest,' &c. The cases have turned, in the construction, on the question of fact, whether the testator had what would answer the words of his will, on which the words would operate. Then [that is, If he had], the surrender should not be supplied [in favour of a wife or children]; as was before Lord Talbot, in 1735, and the case of *Bethlehem Hospital*, 10th June, 1735, that 'all my lands' would not pass copyhold lands not surrendered, if there were other lands to satisfy the words; but, if surrendered, that will explain the general words, and pass them. Here is that which would come within the description of 'real estate.' Then, without a surrender to the use of the will, or mention of copyhold, the court will not take it from the heir. In the present case, there is nothing, either by act, as by surrender, or by words, although no surrender, to warrant the

court to say, the younger daughter is disinherited of that, which, by law, ought to descend to her, and that the mother is entitled to the benefit of this copyhold " (a).

BEFORE the statute 55 *George III.*, c. 192, if a person, seised of freehold and copyhold land, made a general devise of land for the payment of his debts, but did not surrender his copyholds to the use of his will, if the freeholds were not sufficient for the purpose, the court of Chancery, in favour of the creditors, accepted the direction for payment of debts to imply an intention in the testator to include the copyholds in the devise, and, on the intention, supplied the surrender. Thus, in *Drake v. Robinson*, a testator devised all his real estate to trustees and their heirs, for the payment of his debts. He was seised of several freehold and copyhold lands, but did not surrender the latter to the use of his will. Part of the copyhold was of the nature of Borough-English. It was objected: "The copyhold does not pass by this devise; for although, in the case of creditors, equity will supply the want of a surrender, yet the copyhold ought ever to be mentioned in the will, especially where, as in the present case, there is a freehold estate that will satisfy the words of the will." By the Lord Chancellor *Parker*: "If the copyhold passes, the youngest son, who is entitled to such part thereof as is Borough-English, must contribute to pay his proportion of the debts. As betwixt the sons it is a doubtful case; but, with regard to the creditors, if there be not an estate sufficient for the payment of the debts, without the copyhold lands, my opinion is, that these ought to pass. The man is not a just man, unless he takes care to pay his debts; for

(a) 2 Ves. 164.

which reason, he has made choice of words large enough for that purpose, a copyhold estate being a real estate. And since the testator's first intention is to be honest, and pay his debts, to cramp such his design, by a narrow construction, seems like being accessary to the making such testator a knave, even against his will. But let the Master first see, whether there be enough without the copyhold for the payment of the debts" (a). In *Haslewood v. Pope*, it was determined by the Lord Chancellor *Talbot*, that "if a man devises all his lands, tenements, and hereditaments, in trust to pay his debts and legacies, and the testator has some freehold and some copyhold lands, only the freehold lands shall pass, for his will must be intended of such lands and tenements as are devisable in their nature. *Secus*, if the testator had surrendered his copyhold lands to the use of his will, because this shews he did intend to devise his copyhold. But even, in the first case, if the freehold were not sufficient to pay his debts, when the testator devises all his lands in trust to pay his debts, it seems, rather than the debts should go unpaid, that the copyhold shall in equity pass" (b).

Since the statute 55 *George III.*, c. 192, a surrender not being essential, at law or in equity, to the validity of a will of copyholds, it should seem, that if, at the present day, a person devises land, generally, for the payment of his debts; in equity, the simple direction for the payment of debts, without supplying the surrender, will be sufficient to extend the devise to the unsurrendered copyhold lands of the testator, provided the freehold lands are not sufficient for the purpose. But it has been determined, that if the freehold lands of the testator are sufficient to satisfy the debts, the copyholds

(a) 1 P. W. 443.

(b) 3 P. W. 322.

will not pass, even in equity, by the general devise in the will (a).

If there is a devise of land, generally, in a will, it appears collateral evidence is admissible to explain the intention to be to include copyholds in the devise.

In *Car v. Ellison*, *William Car* devised as follows: "I give and devise all my messuages, lands, tenements, and hereditaments, in *St. Helen's, Auckland*, and elsewhere in the county of *Durham*, and all other my real estate, to *Sir Ralph Milbank* and — *Hedworth*, and to their executors and administrators, for 500 years [on various trusts]; and, after the determination of the said term, I give all the premises to my wife for and during her natural life, without impeachment of waste." The copyholds were not surrendered to the use of the will, the testator having an equitable estate only in them, the legal estate being in trustees. By Lord *Hardwicke*: "I am of opinion the trust of these copyhold estates will pass without a surrender to the uses of the will. This being out of the case, the next question is, whether here is a sufficient indication of the testator's intention that the trustees should have the copyhold as well as the real [freehold] estate. As to this, the words of the will and the nature of the case must determine it. There is no dispute but the words are large enough to pass the copyhold lands. There cannot possibly be larger to pass any real interest a testator has in lands, than 'all other my real estate.' The words, then, being large enough, the next question is, whether it appears to be the intention of the testator they should pass. The real estate was originally the inheritance of the wife, consisting of part

(a) *Mallabar v. Mallabar*, Cas. temp. Talb. 78. *Lindopp v. Eborall*, 3 Bro. C. C. 188. See also *Ithell v. Beane*, 1 Ves. 215. *Tudor v. Anson*, 2 Ves. 582.

freehold and part copyhold. Upon the marriage, the freehold lands were by settlement conveyed, by the fine of the husband and wife, to Sir *Ralph Milbank* and — *Hedworth*, in trust for the husband and wife during their joint lives, and the survivor, with remainder to the heirs of their two bodies, remainder in fee to the husband. Mr. *Car* and his wife likewise made a surrender of the copyhold lands to the same trustees, and for the same purposes, with the freehold lands. After this, the husband makes his will. What appears to be the intention? Why, as the wife had been so generous as to give the remainder in fee to him, he was willing to return the compliment to her. It cannot be presumed that the testator intended to sever the copyhold, which came at the same time with the freehold, and, therefore, this is a strong circumstance to indicate the testator's intention; and to construe it otherwise would be to dismember the estate, which could never be meant, when he devises to the same trustees as were under the settlement. The material circumstance here is, the intention of the testator to restore the estates to the wife, from whom they originally came; and, therefore, he could not mean to dismember and sever the copyhold estate from the freehold." His Lordship decreed the copyhold land passed to the trustees by the general words of the will(a).

It farther appears, that a *surrender* of copyholds to the use of a will (for the statute of *George III.* does not invalidate a surrender), is, at least in equity, admissible collateral evidence to prove that copyholds are meant by the testator to be included in the general devise in his will. In *Tendril v. Smith*, it is stated by Lord *Hardwicke*: "Where copyhold lands are surrendered to the use of a will; by a devise of lands generally, the copyhold will pass, notwith-

(a) 3 Atk. 73.

standing there are freeholds to answer such devise" (a). And, again, in *Goodwyn v. Goodwyn*, where a testator devised "all his messuages, lands, tenements, and hereditaments whatsoever, in *Norfolk*;" Lord *Hardwicke* was of opinion, "that the copyhold lands were comprised, from the intent to pass them; although there are several cases, that a devise in general words of all lands and tenements will not comprise copyhold lands, which are not surrendered to the use of the will, so as to shew an intent to comprise them. And where the intention of the testator of raising portions or payment of debts may be answered by freehold lands, the court will not suppose he intended to pass the copyhold. And, although surrendered, yet if the words are not sufficient to take them in, they will not pass. But here they are sufficient, and the surrender effectuates that intent (b)." In *Doe v. the Earl of Lucan*, it is said by Lord *Ellenborough*: "In construing the devise in question, I shall proceed merely on the testator's intention, as I collect it from the face of the will; for I am afraid to look at any argument of intention to be derived from the surrender to the use of his will; although perhaps it may be proper to be regarded even in this Court, as it certainly would be in another court; but it is not necessary for me to give any opinion upon that point, for I profess to determine this case on the intention, as collected from the words of the will only" (c). On this passage it is observable, that it appears from many authorities, that, in general cases, if an intention is discovered in a will (d), collateral evidence, unless it tends to have no legal effect (e), is admissible to explain it; that the evidence is

(a) 2 Atk. 85.

sey, 1 Barn. & A. 550; 3 Barn. & C. 870. See Chapter III.

(b) 1 Ves. 226.

(c) 9 East, 460.

(e) *Doe v. Greening*, 3 M. & S.(d) *Goodtitle v. Southern*, 1 M.171. *Doe v. Westlake*, 4 Barn. & A. 57.& S. 299. *Doe v. The Earl of Jer-*

admissible at law and in equity; that it appears, in equity, a surrender to the use of a will is, on a devise of land generally, evidence sufficient of an intention to include the copyholds; and that in *Tendril v. Smith*, and *Goodwyn v. Goodwyn*, the expressions of Lord *Hardwicke* are general, without distinction of courts.

It remains to notice, that copyhold lands will pass by the same clause which devises the freehold lands of the testator, if the copyholds appear to be *separately* named by any word in the devise. In *Doe v. the Earl of Lucan*, they were held to pass principally under the word '*farms*' in the devise (*a*).

SECTION XIV.

Of a Devise without words of Inheritance.

THE technical effect of a limitation to *A.*, without adding any words of inheritance, is to convey to *A.* a life-estate only. If, therefore, a person seised in fee, devises to *A.*, without any words of inheritance, the legal effect of the devise is to convey to *A.* an estate for life only, unless there are farther words in the will which explain the intention to be, to give to the devisee a greater estate (*b*). "Another distinction," said Lord *Mansfield*, in a case before him, after observing on prospective devises of lands of inheritance, "founded on the notion that a will affecting lands is merely a species of conveyance, and derived

(*a*) 9 East, 448.

(*b*) *Roe v. Blackett*, Cowp. 235. *Denn v. Gaskin*, *ibid*, 657. *Right v. Sidebotham*, Dougl. 730. *Roe v. Bolton*, and *Right v. Russell*, cited, *ibid*, 732. *Hay v. Earl of Coventry*, 3 T. R. 83. *Goodtitle*

v. Edmonds, 7 T. R. 635. *Doe v. Allen*, 8 T. R. 497. *Foster v. Lord Romney*, 11 East, 594. *Denne v. Page*, *ibid*, 603, note (*b*). *Doe v. Westley*, 4 Barn. & C. 667. *Fawcett's case*, 1 Roll. Abr. 834. *Roe v. Holmes*, 2 Wils. 80.

from the same source, is this: The law of *England*, in the conveyance of real estates, requires words of limitation, in the donation or grant, to the creation of a fee. Without the word heirs, general or special, no man can create a fee at common law by conveyance. When wills, therefore, were introduced, and devises of real property began to prevail; being considered as a species of conveyance, they were to be governed by the same rule. Therefore, by analogy to that rule, in the construction of devises, if there be no words of limitation added, nor words of perpetuity annexed, which have been held tantamount, so as to denote the intention of the testator to convey the inheritance to the devisee, he can only take an estate for life. For instance, if a testator by his will says, I give my lands, or such and such lands, to A.; if no words of limitation are added, A. has only an estate for life”(a).

It frequently happens in a will, that two estates are separately devised to the same person; one with words of inheritance, and the other without them. In these cases, it appears, the devise of inheritance is not, by itself, evidence sufficient of an intention to devise both lands for an estate of inheritance.

It is stated in *Rolle's Abridgment*: “If a man devises in this manner; I devise *Black Acre* to my daughter F., and to the heirs of her body begotten. Item, I devise to my said daughter, *White Acre*; the daughter shall have but an estate for life in *White Acre*, for the word ‘Item’ does not amount to ‘in the same manner.’—If a man devises *Black Acre* to one in tail and also *White Acre*; the devisee shall have an estate-tail in *White Acre* also, for this is all one sentence, and so the words which make the limitation of the estate extend to both.” (b). In *Spirit*

(a) Cowp. 306.

(b) 1 Roll. Abr. 844.

v. *Bence*, a testator devised in the words: "I give to my son *Henry* and his heirs freely my house in the borough of *Wickwarr*, in which I dwell. ~ Item, I give to my said son *Henry* my house and lands in *Impsteade*. ~ Item, I give to him two houses in *Wickwarr*, in the tenure of *J. St.* ~ Item, I give to the said *Henry* my pastures, called *the South Fields*, and one meadow called *Warhay*, in *Wickwarr* (the land, in question). Also, I will that all bargains, grants, and covenants, which I have from *Nicholas Webb*; my son *Henry* shall enjoy, and his heirs for ever; and, for lack of heirs of his body, to remain to my son *Francis* for ever." It was held "that *Henry* had but an estate for life in the land in question, and that the last clause, 'and for lack of heirs of his body,' shall extend only to the lands in that clause; viz., to the bargains and grants. And that when the testator gave to *Henry* in fee, and then to *Henry* only, not mentioning any estate, the law shall construe it that he shall have the lands but for life; and that the testator did not intend a greater estate; and for the word 'also,' it is no more than the word 'and,' and shall not extend to the quantity of the estate, but to the clause following" (a). In *Paice v. the Archbishop of Canterbury*, a testatrix devised in the words: "I give and bequeath to the reverend *Henry Taylor*, my farm and lands at *Royston* in *Lincolnshire*, to him, his heirs and assigns for ever, and I also give and bequeath to the said reverend *Henry Taylor*, my farm and manor of *Fythorne Court*, in the county of *Kent*." "The only question," said Lord *Eldon*, "on this devise is, whether the word 'also,' has precisely the same operation as the addition of the words 'his heirs and assigns for ever,' in the devise of the other estate immediately preceding. Upon reflection, although I believe the court of King's Bench has gone as far in the con-

(a) Cro. Car. 368.

struction of the word 'also,' as Sir *Arthur Piggott* contended, it seems to me, that all the old rules against dis-inheriting an heir, except by plain words or necessary implication, are gone, if such a construction is to prevail. My opinion therefore is, that this devisee took an estate for life only in the farm and manor of *Eythorne Court*" (a).

After devises of estates of inheritance, it sometimes happens that cross-remainders of the land are limited without words of inheritance. In these cases, unless there are farther words in the will to explain the intention to be different, the devisee takes an estate for life only in remainder.

In *Pettywood v. Cook*, one *Hawkins* was seised in fee of three houses in *Bury*, and devised them to his wife for life, the remainder of one other of the messuages to *Robert* his son, and his heirs, the remainder of one other of the messuages to *Christian* his daughter, and her heirs; and of the third messuage, to *Joan*, his daughter, and her heirs. And did further will that if any of them died without issue, that then the survivors should enjoy *totam illam partem* equally divided between them. All the Justices of the King's Bench held, "that, by the devise, only an estate for life is limited to the survivor; although the words are 'that the survivor shall enjoy *totam illam partem*;' that is [for these words mean], all the messuage, and not all the estate the party dying had in the messuage; for no estate being limited, it shall be intended but an estate for life" (b). In *Woodward v. Glasbrook*, a testator devised a house in *Lime-street*, to his sons *James* and *Thomas*, and the heirs of their bodies, in equal moieties; and devised other houses to his other children in like manner; and then added, "but my will and mind is, that if any of my said children shall

(a) 14 Ves. 364. The argument of Sir A. Piggott is not reported. (b) Cro. Eliz. 52. *Hawkins'* case, 2 Leon. 129, 193. S. C.

die before 21, or unmarried, the part or share of him or her so dying, shall go over to the survivors." On this will it was determined, "that, by the devise over, only an estate passed to the survivors for their lives" (a).

SECTION XV.

Of a Devise for Life, without Impeachment of Waste.

A COMMON devise is to a person for life, without impeachment of waste. Waste appears to be any injury illegally done to the estate, which depreciates the value of the inheritance. To cut down timber, as an instance, is waste. The conversion of land from one species to another is waste. To convert wood, meadow, or pasture into arable; to turn arable, meadow, or pasture into woodland; or to turn arable or woodland into meadow or pasture, are waste: for it not only changes the course of husbandry, but the evidence of the estate, when such a close, which is conveyed and described as pasture, is found to be arable, and *e converso*. And the same rule is observed, for the same reason, with regard to converting one species of edifice into another, even although it is improved in its value. To open the land to search for mines of metal, coal, &c., is waste; for that is a detriment to the inheritance; although, if the pits or mines were open before, it is not considered to be waste to continue to dig them, and the tenant is entitled to their produce, as an ordinary annual profit of the land (b). The punishment of waste is the forfeiture of the place wasted, and treble damages (c). He, then, who is tenant for life, "without impeachment of waste," is free of the liability to be sued for waste, and

(a) 2 Vern. 388.

(c) *Ibid*, 282.

(b) 2 Bl. C. 281, 282.

consequently of the punishment for it. But, farther, to be unimpeachable for waste, is not merely the negative privilege of impunity; it is a license to commit waste (*a*). In particular, a tenant for life, "without impeachment of waste," is entitled to cut down timber on the estate; and the moment it is cut down, it becomes his own property (*b*).

But although a tenant for life without impeachment of waste may legally commit many kinds of waste, he may be restrained by an injunction, out of the court of Chancery, from committing many other kinds of waste, which, in the consideration of the court, were not intended by the testator to be within the protection of the clause, "without impeachment of waste." In *Vane v. Lord Barnard*, the defendant was tenant for life without impeachment of waste, remainder to his son for life, and, having taken a displeasure against his son, got 200 workmen together, and began to pull down the family mansion, *Raby Castle*; but he was stopped by the Lord Chancellor *Cowper*, and decreed to repair it (*c*). In *Sir Herbert Packington's* case, Lord *Hardwicke* granted an injunction to restrain the cutting down of timber in a park, the trees being an ornament and shelter to the mansion-house (*d*). In *Strathmore v. Bowes*, the husband of a tenant for life, without impeachment of waste, was restrained from cutting down young saplings, not fit to cut as timber; and also from cutting down timber trees in pleasure plantations a mile distant from the house (*e*). The principle of granting an injunction to prevent the cutting of trees applies to trees planted for the

(*a*) Co. Litt. 220 a.

(*b*) *Lewis Bowles' case*, 11 Co. 79 b. *Pyne v. Dor*, 1 T. R. 55. *Williams v. Williams*, 12 East, 206; 1 Ves. 265. 3 Bingh. 211.

(*c*) 2 Vern. 738.

(*d*) 3 Atk. 215. See *Lawley v. Lawley*, cited Jacob Rep. 71, note (*b*).

(*e*) 2 Bro. C. C. 88.

ornament of the *estate*, as distinguished from the ornament of the mansion-house, although they are distant, and even are not seen from the house (*a*); and also to trees planted by a testator purposely for ornament, although, in point of taste, their effect is not ornamental (*b*); and, farther, to trees planted for the purpose of excluding objects from view (*c*). But it appears, the principle does not extend to a wood, covering thirty acres, although ornamental (*d*); nor to trees which happen to be ornamental, if they were not planted, nor have been left standing, purposely for ornament (*e*); nor to trees planted to protect the estate from the effects of the sea (*f*); nor to trees fit for the purposes of timber, although young, and which a tenant in fee, acting in a husband-like manner, would not cut (*g*).

SECTION XVI.

Of Devises in joint-tenancy, and in common.

A DEVISE to two or more persons creates a *joint-tenancy*, unless it appears to be the intention of the testator to devise to them in *common* (*h*).

Few testators can be supposed to understand the technical terms, "*joint-tenancy*," and "*tenancy in common*;" although they understand the practical distinctions between a joint interest in land with survivorship, and separate interests in undivided shares of it without survivorship. If

(*a*) *Marquis of Downshire v.* 70; 6 Madd. Rep. 17.

Lady Sandys, 6 Ves. 107.

(*f*) *Ibid.*

(*b*) *Ibid*, 110. *Jacob Rep.* 71.

(*g*) *Smythe v. Smythe*, 2 Swanst.

(*c*) *Day v. Merry*, 16 Ves. 375.

251.

(*d*) *Burges v. Lamb*, 16 Ves.

(*h*) *Anonymous*, Cro. Eliz. 431.

174.

Clerk v. Clerk, 2 Vern. 323. *Doe*

(*e*) *Coffin v. Coffin*, *Jacob Rep.*

v. Ironmonger, 3 East, 532.

a testator intends to give to two or more devisees a *joint* interest in all the land, *with survivorship*, he intends to create, what is technically called, a *joint-tenancy*; if he intends to give the devisees, *each separately*, an interest in an *undivided share* of the land, he intends to create, what is technically called, a *tenancy in common*. In a *joint-tenancy*, the land is not divided: in a *tenancy in common*, it is; namely, into undivided shares; in other words, into shares of undistinguished land. It is, then, the intent to *divide* (a) the land, which makes a *tenancy in common*. This intent may be expressed by the words of the devise, or implied in them. Words of non-survivorship of interest will imply division of the land (b).

A tenancy in common has been held to be created by the following words of devise:—

“I devise, &c., to my wife, for her life; and, after her death, to A. B. and C., and their heirs respectively for ever” (c).

“I will that my lands, called *Earth-pits*, shall equally remain to Joan and Mary, my two daughters, and the heirs of their two bodies” (d).

“I devise, &c., to my two sons equally, and their heirs” (e).

“I devise, &c., to A. and B., to hold to them, their heirs and assigns for ever, part and part alike (f), and every of them to have as much as the other” (g).

“I give and devise to my two sons, and their heirs, and the longer liver of them, equally to be divided between

(a) 2 Vern. 323. Cowp. 660. Eliz. 444.

3 East, 537.

(b) 1 Salk. 227. 3 Burr. 1885.

(c) Torret v. Frampton, Style, 434.

(d) Shepherd's case, cited Cro.

(e) Lewen v. Cox, Cro. Eliz.

695. See *ibid*, 444.

(f) See 2 Atk. 122.

(g) Thorowgood v. Collins, Cro.

Car. 75.

them and their heirs, after the death of my wife, all that my messuage," &c. (a).

"I devise, &c. [a leasehold for years], to my wife for life, and, after her death, to A., and her three sons, equally amongst them" (b).

"I devise, &c. [two houses, held under a lease for years], to my nephews, *John Prince* and *John Heylin*; and my will and meaning is, that the rents of my said two houses shall be equally shared and divided between them, the said *John Prince* and *John Heylin*" (c).

"I devise, &c., to (trustees) and their heirs, in trust, to permit my three sisters, and their assigns, to hold and enjoy the said premises, and to receive the rents thereof, to their sole and separate use, as they shall appoint, notwithstanding their coverture; and as my said sisters shall severally die, I give the premises to their several heirs" (d).

"I devise, &c. [freehold and leasehold estates], to A., in trust to pay out of the rents and profits [certain annuities], and the remaining profits I give to A., in trust for my six younger children, to be distributed among them in joint and equal proportions" (e).

"I devise, &c. (to trustees), and their heirs, on trust, by sale or mortgage of any part, to raise so much to pay all my debts as my personal estate shall not extend to; the remainder of all my estate to go and be equally divided amongst my three younger children, and the survivor of them, and their heirs for ever" (f).

"I devise, &c., to my five sons and daughters, and the survivors and survivor of them, and the executors and

(a) *Blisset v. Cranwell*, 1 Salk. 226. See 1 P. W. 16; and *Thickness v. Vernon*, 1 Vern. 32.

(b) *Warner v. Hone*, 1 Eq. Cas. Abr. 292. See also *Stringer v. Phillips*, *ibid.*

(c) *Prince v. Heylin*, 1 Atk. 493.

(d) *Sheppard v. Gibbons*, 2 Atk. 441.

(e) *Ettricke v. Ettricke*, Amb. 656.

(f) *Stones v. Heurtley*, 1 Ves. 165.

administrators of such survivor, share and share alike, as tenants in common, and not as joint-tenants" (a).

"I devise all that my freehold messuage and tenement, in the parish of *Dalston*, to *Matthew Robinson*, *George Robinson*, and *Thomas Robinson*, equally to them my sister's sons" (b).

"I devise, &c., to the use of my niece *Susannah Clarke*, and my two nieces, *Elizabeth Fountain* and *Ann Fountain*, and the survivor and survivors of them, and the heirs of the body of such survivor and survivors, as tenants in common, and not as joint-tenants" (c).

"I devise to my two daughters, *Jane* and *Mary*, all my right in *B.* and *C.* between them" (d).

In *Barker v. Giles*, a person devised his lands to be sold for payment of debts and legacies; the surplus of the money arising from the sale to be laid out in lands, and to be settled to the use of his two nephews, *Jerome* and *Robert Barker*, and the survivor of them and their heirs, equally to be divided between them, share and share alike. Under this will, it was determined, that the two nephews were joint-tenants for life, and tenants in common of the inheritance. "It is a certain rule," said the Lord Chancellor *King*, "in the exposition of wills, that every word shall have its effect, and not be rejected, if any construction can possibly be put upon it; and here I think there may; the first part of the devise being to two, and the survivor of them, makes them plainly joint-tenants for life, and, therefore, they shall be so taken; and then, as to the next words, 'and to their heirs, equally to be divided between them, share and share alike,' these are plainly words importing a tenancy in common, and shall operate accord-

(a) *Rose v. Hill*, 3 Burr. 1881. & P. N. R. 82.

(b) *Denn v. Gaskin*, Cowp. 657. (d) *Lashbrook v. Cock*, 2 Mer.

(c) *Garland v. Thomas*, 1 Bos. 70.

ingly, so as to make them tenants in common of the inheritance ; by which construction of the will every word takes effect" (a). In *Haws v. Haws*, a testator devised to his four children, their heirs and assigns, equally to be divided between them, share and share alike, as tenants in common, and not as joint-tenants, with the benefit of survivorship. By Lord *Hardwicke*: "The words, 'equally to be divided,' import a tenancy in common in a will, if there are no more words ; but here are other expressions, which make it still stronger, 'as tenants in common and not as joint tenants.' The last words are, 'with benefit of survivorship,' and this creates the difficulty. I am of opinion, that these words are not so strong as to control the preceding words ; for to construe them otherwise would be, from doubtful and ambiguous words, to set aside clear and certain expressions. A construction put upon the words by the plaintiff's counsel is, that they refer to a benefit of survivorship to the survivors of the children, if one or more died in the life-time of the testator. But this is too nice a construction ; for it is more natural to suppose, that a man intends the children of his children should be provided for than not, and the Court supposes a parent is taking care of the posterity of his children. Nor is it probable that the testator meant survivorship of himself ; for a testator very seldom provides for a contingency in his life-time, for, when any happens, he may alter his will if he pleases. Not but if no other reasonable construction can be put upon these words, the Court ought to resort to it, as in the case of Lord *Bindon v. the Earl of Suffolk*, 1 P. W. 96: Devise of a debt to five grand-children, share and share alike, equally to be divided between them ; and if any of them die, then to the survivor ; Held to be tenants in common ; for, by the

(a) 2 P. W. 280. 9 Mod. 157.

words, 'if any of them die, his share shall go to the survivor,' Lord Cowper said, 'it must be intended if any of them should die in the life-time of the testator; for, by that construction, every word of the will would have its effect and operation.' There is, in another part of the will, a plain inference, that the testator meant a survivorship arising among one another, and not a survivorship in the life of the testator. It is in the preceding clause relating to the personal estate, where the same words are used, and the benefit of survivorship given in case any of them died before 21. The four children, who are to take the personal, take too the real estate; and the same words, in the same will, ought to have the same sense. He was here making a provision for the younger children, to take, indeed, as tenants in common, but with the benefit of survivorship. What benefit of survivorship could he intend, but the same as he intended in the survivorship of the testamentary part of his personal estate? I do not doubt but this was his real intention, as he was making a provision for younger children; and, if one of them should die, did not intend any part of it should go away to his eldest son, which would lessen the provision that was clearly intended for the younger children." His Lordship decreed accordingly (a).

A right of survivorship, it is observable, may consistently be devised with a tenancy in common. A person may devise to two or more persons as tenants in common, with benefit of survivorship. In *Doe v. Abey*, a testator devised in the words: "I give and devise all, &c., to my three sisters, for and during their joint natural lives, and the natural life of the survivor of them, to take as tenants in common, and not as joint tenants. And, from and after the determination of their respective estates, then

(a) 3 Atk. 524. 1 Ves. 13.

to (trustees) and their heirs, during the respective lives of my said three sisters, and the life of the survivor of them, upon trust to prevent the contingent estates hereinafter limited from being defeated or destroyed; and, from and after the respective deceases of my said three sisters, and the decease of the survivor of them," [remainders over]. It was determined, on this will, that the three sisters took as tenants in common with benefit of survivorship. "To take as tenants in common," said Lord *Ellenborough*, "is, correctly speaking, repugnant to taking with benefit of survivorship; but if those words are understood to mean, that they were to enjoy the lands as tenants in common, which they might do with benefit of survivorship, then the only repugnancy seems to be in the words 'and not as joint-tenants.' I would preserve the words 'to take as tenants in common;' the words 'tenants in common' are of flexible meaning, and may be understood, that although they should take by survivorship as joint-tenants, yet the enjoyment was to be regulated amongst them, as tenants in common." And Mr. Justice *Bayley*: "The fair construction is to treat it as a devise to the sisters as tenants in common, with benefit of survivorship, and thereby give effect to all the words. A tenancy in common, with benefit of survivorship, is a case which may exist, without being a joint-tenancy; because survivorship is not the only characteristic of a joint-tenancy. There is one view in which it might be important to the testator to create a tenancy in common with survivorship, and yet not a joint-tenancy. It might be important in this view, because if it were a joint-tenancy, one joint-tenant might, by means of a lease made during her life, convey to her lessee a title paramount to that of the survivors. It might, therefore, be

the object of the testator to obviate such a consequence, which would, in effect, defeat his intention" (a).

SECTION XVII.

Of a Devise to an Infant when of Age.

ON a devise until an infant is of age, and then to the infant in fee; the first devise conveys a chattel (b) interest to the first devisee; and the devise to the infant is, during the minority, a vested, and not a contingent, remainder, and falls into possession when the infant comes of age, or at his death during the minority (c), unless, notwithstanding his death, the preceding estate is intended to continue to the end of the 21 years (d).

In *Boraston's* case, *Thomas Boraston* had issue, *Humphrey*, his eldest son, and *Henry*, his younger son. *Henry* had issue, *Hugh* and *Philip*. *Thomas Boraston* devised in the words:—"I give to *Thomas Amery* and *Amphillis* his wife, all that my upper part of my close, called *Redding*, for eight years next after my decease. And that the said *Thomas Amery*, nor his assigns, shall, during the said term, fell none of the wood or timber in or upon the said upper part, but shall preserve the woods to the use and behalf of the heir in remainder. And, after the term of the said eight years, the said upper part to remain to my executors, until such time as *Hugh Boraston* shall accomplish his full age of 21 years, and the mean profits to be employed by my executors towards the performance of this my last will and testament. And, when the said

(a) 1 M. & S. 428.

don, 3 P. W. 176.

(b) 1 Burr. 234.

(d) *Boraston's* case, 3 Co. 19.

(c) *Manfield v. Dugard*, 1 Eq. Cas. Abr. 195. *Lomax v. Holme-*

See 3 P. W. 177.

Hugh shall come to his age of 21 years, then I will he shall enjoy the said upper part to him and to his heirs for ever." *Hugh Boraston* died at the age of nine years. It was contended for the plaintiff in this case, that no remainder was vested in *Hugh Boraston*, until he attained his age of 21 years; and that in the meantime, the lands descended to the daughters of the elder son, who were the heirs at law of the devisor; and as *Hugh Boraston* never reached 21, the land never vested in him, but remained in the heir at law. For the defendant it was argued, that the remainder vested in *Hugh* presently by the death of the devisor, and by *Hugh's* death, without issue, the land descended to *Philip*, his brother; and that although *Hugh* died before his full age, yet the interest and term of the executors did not cease. The Court resolved, that the executors had a good term for twelve years [the remainder of the 21], and that it was not determined by the death of the minor. And, farther, "that the case was no other in effect, but that a man devises his lands to his executors (for the payment of his debts), *until* his son shall, or should have, come to his full age of 21 years, the remainder to his son in fee; for although these are adverbs of time, *when*, &c., *then*, &c., yet they do not amount to make any thing to precede the settling of the remainder, no more than in the common case; a man leases land for life or years, and after the decease of the lessee, or the term ended, the remainder to another, yet it shall remain presently; for when these adverbs refer to a thing, which must of necessity happen, there they make no contingency. And, in the case at bar, certain it is, *Hugh* would or might have accomplished his age of 21 years, which are, in this case of a will, all one in construction of law. So that these adverbs, *then* and *when*, in our case

are demonstrations of the time, when the remainder to *Hugh* shall take effect in possession, as in the said cases of a lease for life, and lease for years, and not when the remainder shall vest" (a).

Boraston's case has been followed on the farther devises in the words:—

"I devise, &c., to my wife, till my son and heir apparent shall attain to his age of 21 years, and when my son shall attain to his age, then to my son and his heirs" (b).

"I devise, &c., to the Rev. Mr. *Thomas Hayward* and *John Bates*, and the survivor of them, and the heirs of such survivor, in trust, that they and the survivor of them, his heirs and assigns, shall lay out, employ, and bestow the rents and profits of the said premises for the maintenance, education, and bringing up, and putting forth into the world, of *Thomas* and *John Hayward*, sons of my sister, *Elizabeth Hayward*, during their minorities; and when and as they shall respectively attain their ages of 21, then to the use and behoof of the said sons of my sister *Hayward*, the said *Thomas Hayward* and *John Hayward*, and their heirs, equally" (c).

"I devise, &c., to *Thomas Lea* and *Edward Johnston*, and their heirs and assigns, to hold to them, and their heirs, until *Michael Lea*, second son of my nephew *Thomas*, shall attain the age of 24 years, on condition that they shall, out of the rents and profits, during all that time, keep the buildings in repair. Item, I devise unto *Michael Lea*, my great nephew, and to his heirs and assigns for ever, when and so soon as he shall attain his age of 24 years, all the said," &c. (d).

(a) 3 Co. 19.

(c) *Goodtitle v. Whitby*, 1 Burr.

(b) *Manfield v. Dugard*, 1 Eq. 228.
Cas. Abr. 195.

(d) *Doe v. Lea*, 3 T. R. 41.

Similar devises will also be found in the cases referred to in the margin (a).

SECTION XVIII.

Of Dying without Issue.

To die without issue appears to have a technical meaning. Popularly, *A.* dies without issue, if he leaves no issue *at his death* (b). But, technically, if *A.* leaves issue at his death, still he dies without issue *whenever* the issue fail (c).

A common devise is to *A.* for life, in tail, or in fee; and, farther, to *B.*, when there are no issue living of *A.* There may be no issue living of *A.* at *A.*'s death; or there may be no issue living of *A.* a century hence. The devise may be to *B.*, if there are no issue of *A.* living at *A.*'s death, or whenever there are no issue living of *A.*

If a person, seised in fee, devises to *A.*; and, farther, to *B.*, if there are no issue of *A.* living *at A.'s death*; if the devise is to *A.* and the heirs of his body, *A.* will take an estate-tail, and *B.* a contingent remainder (d): if the devise is to *A.* and his heirs, *A.* will take an estate in fee, and the limitation to *B.* will be an executory devise (e).

If a person, seised in fee, devises to *A.*; and, farther, to

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| (a) <i>Lomax v. Holmedon</i> , 3 P. W. 176. <i>Doe v. Underdown</i> , Willes, 293. <i>Goodright v. Parker</i> , 1 M. & S. 692. <i>Edwards v. Symons</i> , 6 Taunt. 213. <i>Farmer v. Francis</i> , 2 Bing. 151. <i>Doe v. Nicholls</i> , 1 Barn. & C. 336. <i>Warter v. Hutchinson</i> , <i>ibid</i> , 721. See also <i>Hanson v. Craham</i> , 6 Ves. 239. | 411. 1 Bro. C. C. 190.
(c) 1 Leo. 286. 1 P. W. 433, 666. Cowp. 412.
(d) Butl. Fearné Conting. Rem. 7th edn., 7 note.
(e) <i>Pells v. Brown</i> , Cro. Jac. 590. <i>Roe v. Jeffery</i> , 7 T. R. 589. <i>Doe v. Wetton</i> , 2 Bos. & P. 324. <i>Doe v. Webber</i> , 1 Barn. & A. 713. <i>Doe v. Frost</i> , 3 Barn. & A. 546. |
| (b) 1 P. W. 199, 432. Cowp. | |

B., *whenever* there are no issue living of *A.*; whether the limitation to *A.* is to *A.* simply (*a*), for life (*b*), in tail (*c*), or in fee (*d*), *A.* will take an estate-tail, and *B.* a remainder.

If a person, seised in fee, devises to *A.* simply, for life, in tail, or in fee; and, farther, in the words, "and if *A.* dies without issue," to *B.*; *B.*, under the technical interpretation of these words, will be entitled to the land, *whenever* the issue of *A.* are extinct, whether at *A.*'s death, or at any time afterwards. To confine these words, "if *A.* dies without issue," to the meaning of dying without leaving issue *at A.*'s death, there must be other words in the will, which express or imply this intention; otherwise, the interpretation of the will will depend on the technical signification of the words (*e*). But if there *are* words in the will which prove the testator means dying without leaving issue *at A.*'s death; in this, as in other cases, the testator's own meaning of the words will control their technical signification (*f*).

There are many other expressions, it should be observed, which are construed to have the same import as the words, "and if *A.* dies without issue," and are understood to express the testator's intention to be, to entitle *B.* to the land *whenever* the issue of *A.* fail. The particular words in the devises which follow have been construed to have this meaning; and, in consequence, the first devisee has, in each case, been held to take an estate-tail, and the second devisee a remainder:—

"I devise, &c., to *William*, my second son; and, if he

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| (a) <i>Lee's case</i> , 1 <i>Leo.</i> 285. <i>Hope v. Taylor</i> , 1 <i>Burr.</i> 268. <i>Willes</i> , 3. | <i>Denn v. Shenton</i> , <i>Cowp.</i> 410. <i>Tenny v. Agar</i> , 12 <i>East</i> , 253. <i>Dansey v. Griffiths</i> , 4 <i>M. & S.</i> 61. <i>Romilly, knt. v. James</i> , 6 <i>Taunt.</i> 263. |
| (b) <i>Robinson's case</i> , cited 1 <i>Ventr.</i> 230. | (e) <i>Cowp.</i> 411. 12 <i>East</i> , 261. |
| (c) <i>Elton v. Eason</i> , 19 <i>Ves.</i> 73. | (f) 12 <i>East</i> , 262. |
| (d) <i>Brice v. Smith</i> , <i>Willes</i> , 1. | |

depart this world not having issue, then I will that my sons-in-law shall sell my lands" (a).

"I give and bequeath, &c., to my dear children, if I should leave any to survive me; but, in case I should leave no such child or children, nor the issue of such child or children, then I give and bequeath," &c. (b).

"I give and bequeath to my grandson, *Samuel Shenton*, all, &c.; to hold to the said *Samuel Shenton*, and the heirs of his body lawfully to be begotten, and their heirs for ever; but, in case the said *Samuel Shenton* shall die without leaving issue of his body, then I give," &c. (c).

"I devise, &c., to my son, *John Agar*, and his heirs for ever; on this condition only, that he shall yearly, by half-yearly payments, at Michaelmas and Lady-day, pay to my daughter, *Elizabeth Agar*, the full and just sum of 12*l.* a year, until she shall attain the age of 21 years, and after that age to pay her 300*l.* in lieu thereof, and in full of her portion; and, for default of payment of any part so bequeathed to her, she shall enter into the said nine closes, and shall enjoy them all to her and her heirs for ever in case of non-payment or non-performance as afore limited, but not otherwise. And, in case my said son and daughter both happen to die without leaving any child or issue, lawfully begotten or to be begotten, then and in such case only I give and devise," &c. (d).

"I devise, &c., to (trustees) and their heirs, in trust to apply the rents and profits of my estates and effects for my son during his life; and afterwards for the heirs of his body, if any; and, in default of such issue, then in trust," &c. (e).

"I devise to my eldest son, *Dansey Richard Dansey*,"

(a) *Lee's case*, 1 *Leo*. 285.

(b) *Southby v. Stonehouse*, 2 *Ves.* 611.

(c) *Denn v. Shenton*, *Cowp.* 410 —

(d) *Tenny v. Agar*, 12 *East*, 253 —

(e) *Elton v. Eason*, 19 *Ves.* 73.

and his heirs for ever, all, &c.; but if it shall so happen that my eldest son, *D. R. Dansey*, shall die and leave no issue, then I devise," &c. (a).

"I devise to my brother, *H. Smith*, all my real estate, subject to the several devises hereinafter expressed. I devise to my brother's son, *H. Smith*, all my estate in *Radnorshire*, called the *Meadows* under *Stanmer*; to hold to him and his heirs for ever. And, farther, my will is, that in case my brother, and his son, my nephew, shall happen to die, having no issue of either of their bodies, then I devise all my real estate to my nephew, *Josias Clerk*, and his heirs" (b).

A TERM of years cannot be entailed, and it is illegal to devise in perpetuity. If, then, a termor for years devises the term to *A.*, simply, and, if *A.* dies without issue, to *B.* (c); or to *A.* for life, and, if *A.* dies without issue, to *B.* (d); or to *A.* for life, and afterwards to the heirs of his body; and, if *A.* dies without issue, to *B.* (e); or to *A.* and the heirs of his body, and, if *A.* dies without issue, to *B.* (f); in either case, under the technical interpretation of the words 'and if *A.* dies without issue,' the limitation to *B.* is too remote, and in consequence void, and the land for all the term is the property of *A.* and his personal representatives (g).

Neither on a devise to *A.* by a tenant in fee, nor by

(a) *Dansey v. Griffiths*, 4 M. & S. 61. *Kinch v. Ward*. 2 Sim. & St. 409.

(b) *Romilly, knt., v. James*, 6 Taunt. 263. (f) *Crooke v. De Vandes*, 9 Ves. 197.

(c) *Burford v. Lee*, 2 Freeman, 210. (g) See also *Beauclerk v. Dormer*, 2 Atk. 308. *Saltern v. Saltern*, 2 Atk. 376. *Chandless v. Price*, 3 Ves. 99. *Russell's Rep.* 264.

(d) *Love v. Windham*, 1 Lev. 290.

(e) *Elton v. Eason*, 19 Ves. 73.

a termor for years, do the words "and if *A.* dies without issue," of themselves, imply a dying without leaving issue at *A.*'s death (*a*). But it appears to be a distinction, that if a person, seised in fee, devises to *A.* for life, in tail, or in fee; and, if *A.* dies without *leaving* issue, to *B.*; the word *leave* does not imply a dying, without issue living at *A.*'s death; and, therefore, *A.* takes an estate-tail, and *B.* a remainder. But if a termor for years devises to *A.*, and, if *A.* dies without leaving issue, to *B.*; the word *leave* does imply a dying without issue living at *A.*'s death; and, therefore, in this case, the limitation to *B.* is an executory devise expectant on the death of *A.* without leaving issue then living. This distinction was made in *Forth v. Chapman* (*b*), and is acknowledged in modern cases (*c*).

In the devises which follow by termors for years, the failure of issue has been held to be confined to the time of the death of the first devisee. The limitation over, in each case, was, in consequence, not too remote, and the first devisee took the term subject to the executory devise over (*d*):—

"I devise, &c., to my son *Henry* for his life and no longer; and, after his decease, to such of the issue of the said *Henry*, as *Henry* by his will shall appoint; and, in case *Henry* shall die without issue, then I devise," &c. (*e*).

"I devise to *John Chapman* the lease of the ground I

(*a*) *Beauclerk v. Dormer*, 2 Atk. 308. *Saltern v. Saltern*, *ibid*, 376. *Earl of Stafford v. Buckley*, 2 Ves. 171. *Bigge v. Bensley*, 1 Bro. C. C. 187. *Glover v. Strothoff*, 2 Bro. C. C. 33. *Ibid*, 578. *Everest v. Gell*, 1 Ves. jun 286. *Chandless v. Price*, 3 Ves. 99.

Rawlins v. Goldfrap, 5 Ves. 440.

(*b*) 1 P. W. 663.

(*c*) 9 Ves. 204.

(*d*) See also *Nichols v. Hooper*, 1 P. W. 198. *Pinbury v. Elkin*, *ibid*, 563. *Greene v. Ward*, Russell, 262.

(*e*) *Target v. Gaunt*, 1 P. W. 432 —

hold of the school of *Bangor*, for the use of my nephews, *William Gore* and *Walter Gore*; and if either of my nephews *William* or *Walter* shall depart this life, and leave (a) no issue of their respective bodies, then I give," &c. (b).

"I devise, &c., to (trustees), to the use of such children as I shall leave at the time of my death, equally amongst them; and in case any of my said children shall die without leaving any issue, the share of him or her so dying to go to the survivors or survivor of them; and, in case all my said children shall die without leaving any issue, then to the use of *John Hutchinson*" (c).

"I devise, &c., to my son, *George Lyde*, for life; and, after his decease, to the children of *George*, share and share alike; but if *George* shall die without issue of his body, then to my son *Robert Lyde* for life" (d).

"I devise, &c., to my grandson, *Thomas Biley Peake*, son of *Daniel* and *Sarah Peake*, and the heirs lawful of him for ever; but in case he should happen to die and leave no lawful heir, then, and in that case, I give the premises, after the death of the said *Thomas Biley Peake*, to the next eldest son or heir of the said *Daniel Peake* and *Sarah* his wife; and so on to the next eldest son or heir, if the last should die without heirs" (e).

"I devise, &c., to my son *S. Parker*, and to the heirs of his body lawfully begotten, and to their heirs and assigns for ever; but in default of such issue, then after his decease to go to my grandson *T. Wilkinson*, his heirs and assigns for ever" (f).

"I devise, &c., to my grandson *John Wright*, and to the

(a) See 1 P. W. 666.

(b) *Forth v. Chapman*, 1 P. W. 663.

(c) *Atkinson v. Hutchinson*, 3 P. W. 258.

(d) *Doe v. Lyde*, 1 T. R. 593.

(e) *Goodtitle v. Pegden*, 2 T. R. 720.

(f) *Wilkinson v. South*, 7 T. R. 555.

heirs of his body lawfully issuing ; but in case my grandson dies and leaves no such heirs, then I bequeath the said premises to my grandson, *John Crosse Crooke*, and such his heirs" (a).

"I devise, &c., to (trustees) upon trust to pay and apply the sum of 30*l.* for the benefit of my wife during her life, out of the rents and profits, and the residue for the maintenance and benefit of my daughter, *Emma Sarah*. And after the death of my wife, the whole of the rents, issues, and profits of the said houses and premises shall be the sole property of my said daughter, *Emma Sarah*, and her children lawfully begotten ; and in default of such issue, and in case of her death, the said houses and premises shall become the joint property of my sons, *Felix* and *William Paul*, or the survivor of them" (b).

SECTION XIX.

Of a Devise by a Tenant *pur auter vie*.

IF a person, seised of lands *pur auter vie*, devises them to A. and his heirs ; if, at A.'s death, they descend to the heirs, they will be *special occupants* of the lands. So, if the devise is to A., and the heirs of his body ; if, at A.'s death the lands descend, the issue of A. will be special occupants (c). If the devise is to A. for life, remainder to B. for life ; on the determination of A.'s estate, B. will be a special occupant (d).

An estate *pur auter vie* may be entailed (e), in the sense

(a) *Crooke v. De Vandes*, 9 Ves.
197.

(b) *Gawler v. Cadby*, Jacob
Rep. 346.

(c) 6 T. R. 292.

(d) 3 P. W. 264. 3 Atk. 376.

(e) 2 Vern. 185.

(which is the true meaning of the word) that the heirs general are cut off from the line of descent. But an estate-tail of lands held *pur auter vie* is not an entail within the intent of the statute *de donis* (a). If, therefore, a person, seised of lands *pur auter vie*, devises them to A. and the heirs of his body, A. may cut off the entail without either a fine or a common recovery. He may dispose of the estate *pur auter vie* by any conveyance, as by a covenant to stand seised, a bargain and sale, or a lease and release (b); or, in equity, even by an agreement to dispose of it, as to sell or settle it (c). The conveyance, or agreement, will bar the issue of A., and also remainder-men. If, also, the estate *pur auter vie* is held under a lease, and A. surrenders the lease, the issue and remainder-men will be barred by it. And if, on the surrender, A. takes a new lease, this he will be entitled to, independently of the devise of the surrendered lease, and neither the issue of A., nor remainder-men, devisees of the old lease, will have an interest in the renewed one (d). It farther appears, that A. may bar his issue (e), and perhaps also remainder-men (f), by devise. It has been mentioned, that A.'s estate is not an estate-tail within the intent of the statute *de donis*; it may be added, it is not an entail (or fee-conditional) at common law. A. is entitled to dispose of the estate *pur auter vie* before the birth of issue (g).

(a) 2 Vern. 226. 3 P. W. 263.
1 Atk. 525.

(b) 2 Vern. 225. 1 Atk. 525.
2 Atk. 376. Grey v. Mannock,
cited 6 T. R. 292. Doe v. Lux-
ton, *ibid*, 289.

(c) Wastneys v. Chappell. 1 Bro.
P. C. 457, cited 1 Atk. 525.

(d) Baker v. Bayley, 2 Vern.
225. Duke of Grafton v. Harmer,
3 P. W. 266, note (e). Cooper
Rep. 186.

(e) Grey v. Mannock, cited 6 T.
R. 292.

(f) See 6 T. R. 293.

(g) Harg. Co. Litt. 20 a (5).

SECTION XX.

Of a Devise by a Mortgagee.

It appears that if a mortgagee for *years*, the mortgage being forfeited, devises in the words "I devise my mortgages to A.," the devise will entitle A. to the money due on the mortgage, and also to the legal estate in the term (a).

If a mortgagee in *fee*, the mortgage being forfeited, devises simply in the words, "I devise my mortgages to A.," it appears to be clear, that A. will be entitled to the money due on the mortgage (b); but there seems to be considerable doubt if, in this case, there not being other words in the will to explain the testator's intention, the legal estate in fee of the mortgagee, will, as well as the money, pass under the devise (c). There is an appearance, that the legal estate in fee may be considered to descend to the testator's heir at law, in trust for the devisee of the money or beneficial interest in the mortgage (d). In *Crips v. Grysil*, a mortgagee in fee, before forfeiture of the mortgage, devised to *Robert Key*, "all his goods, monies, bills or bonds, mortgages or specialties for monies;" and made him executor; and, without argument, the opinion of the court of Common Pleas was, "that these words, 'all my mortgages,' made a good devise of the lands mortgaged" (e). And in *Silberschildt v. Schiott*, on a devise by

(a) *Crips v. Grysil*, Cro. Car. 37. *Wilkinson v. Merryland*, *ibid.* 447, 449, 450. 3 Ves. & B. 49. 449. 2 Ves. 46. 3 Ves. & B. 49. But see 2 Ves. 46.

(d) *Wilkinson v. Merryland*,

(b) 2 Ves. 46. *Crips v. Grysil*, Cro. Car. 37.

Cro. Car. 447, 449. 2 Ves. 46.

(e) Cro. Car. 37.

(c) *Crips v. Grysil*, Cro. Car. 37.

a mortgagee in fee, after foreclosure of the mortgage, it is stated by Sir *William Grant* :—"The testator seems not very well to have understood the effect of a foreclosure; and still continues to describe as a mortgage the interest he had. If his interest had been really such, there is no doubt a gift of the money would have carried his interest in the land upon which it was secured" (a). On the other hand, in *Wilkinson v. Merryland*, determined after *Crips v. Grysil*, it appears that a person was seised of land in A., B., and C., in fee. The lands in C. were lands mortgaged to him. After forfeiture of the mortgage, he devised the lands in A. and B., to several persons in fee; and, after several bequests of legacies, added this clause: "All the rest of my goods, chattels, leases, estates, mortgages, debts, ready money, plate, and other goods, whereof I am possessed, I devise to my wife, after my debts and legacies paid." He also made his wife executrix. On this will, the question came before the court of King's Bench, whether the fee passed to the wife by the words, 'all my estates, mortgages,' &c.; and it was held, "that no fee passed to her" (b). This case came again before the Court; "But *Jones* and *myself*," says the reporter (*Croke*), "continued of our former opinion, that no fee passed. But the greater question would have been, whether an estate for life had passed to the wife if she had been alive; because it is coupled only with personal things, as 'goods, leases, estates, mortgages, debts,' &c., which may be intended, that he meant only but estates for years, or mortgages for years; and so much the rather, by reason of the words, 'whereof I am possessed.' And *Berkley*, Justice, (who was absent the day before) concurred in opinion; for the heir shall not be disinherited, nor the fee passed

(a) 3 Ves. & B. 49.

(b) Cro. Car. 447.

away, without an apparent intent out of the words of the will. And in this case it doth not appear that he intended to pass but such things whereof he was possessed, which extends only to things personal or leases, whereof he is *possessed*, and not to freehold, whereof he is said in law to be *seised*. And, peradventure, he was not possessed of this land; for it is not found, that the mortgagee entered and was in possession: and commonly, in mortgages, the mortgagor retains the possession until the mortgagee enters for a forfeiture. Wherefore, it was appointed, that judgment should be entered for the plaintiff. But they agreed, if he had devised, 'all his estate in such land,' or had mentioned that he had such land mortgaged in fee, and devised 'his mortgage,' the fee had passed" (a). In agreement with *Wilkinson v. Merryland* appears to be the opinion of the Master of the Rolls, Sir John Strange, in the *Attorney-General v. Meyrick*; where, on a bequest of money due by mortgage, he stated:—"By a gift of all one's mortgages to A., the whole beneficial right passes to him; and be the legal interest either in the heir or executor, as it is a mortgage in fee or term for years, each will be considered as trustee for A., who will be permitted by the Court to use their names to get the money or make the pledged estate his own by foreclosure" (b).

IF a mortgagee in *fee*, or for *years*, after forfeiture of the mortgage, devises in the words, "I devise my messuages, tenements, lands, hereditaments, and premises, to A.;" or, "I devise all my estate to A.;" it appears to be now settled, that the mortgaged lands will pass inclusively in the devise, unless an intention not to include them can be

(a) Cro. Car. 449.

(b) 2 Ves. 46.

inferred from the context (a). In *Ex parte Morgan, John Williams*, a mortgage in fee, devised as follows :—" I give and devise all and singular my messuages, tenements, lands, hereditaments, and premises, and all my real estate, of what nature, kind, or quality soever, and wheresoever the same are situate and being, unto my niece, *Ann Williams*, daughter of my brother, *Edward Williams*, to hold to her, her heirs and assigns for ever ; subject, nevertheless, and charged and chargeable with the payment of one clear annuity, rent-charge, or sum of 20*l.*, to be issuing out of all and singular my said real estates, and payable to my said brother, *Edward Williams*, by his said daughter, *Ann Williams*, her heirs and assigns, by yearly payments, for and during the term of his natural life." The testator appointed *Ann Williams* his executrix ; and died seised of several freehold estates. By Lord *Eldon*, on this will :—" The late cases have taken this turn ; that where general words are used, and upon the will the testator makes a disposition inconsistent with the disposition of that which is not his own, you confine the general words. By this will, everything is charged with an annual outgoing of 20*l.*, which might last longer than the mortgage. From that circumstance, there is inconsistency enough to shew he did not mean to charge this real estate, as real estate, and it is not charged upon his personal estate" (b).

(a) 10 Ves. 103. Butl. Co. *In re Horsfall*, 1 M'Clel. & Y. Litt. 205, a (1) 5. See 2 Vern. 292.
625. 1 Atk. 605. 2 Jac. & W. (b) 10 Ves. 101.
194. 4 Ves. 149 ; 8 Ves. 436, 437.

SECTION XXI.

Of a Devise by a surviving Trustee.

IF a surviving trustee in *fee*, or for *years*, devises in the words, “ I devise my messuages, tenements, lands, hereditaments, and premises, to A. ;” or, “ I devise all my estate to A. ;” it appears to be now settled, that the lands he holds in trust will pass inclusively in the devise, unless an intention not to include them can be inferred from the context (*a*). In *Roe v. Reade*, one *P. Rooke* devised to *G. Reade* and his heirs on the following trust:—“ That he, the said *G. Reade*, or his heirs or assigns, do and shall sell, give, devise, or otherwise dispose of, all that my said messuage, &c., unto and amongst his four children, *G. G. Reade*, *W. Reade*, *B. Reade*, and *J. Reade*, in such manner, and in such shares and proportions, as the said *G. Reade* shall, by any deed or last will and testament duly executed, &c., give, direct, limit, or appoint the same.” *G. G. Reade*, the eldest son of the devisee *G. Reade*, died in the life-time of the testator, leaving an only son, *G. Reade*. After the death of *P. Rooke*, *G. Reade*, the devisee, appointed three-fourth parts of the premises to his three surviving children. *G. Reade*, son of *G. G. Reade*, attained his age of 21, and died leaving *G. Reade*, the lessor of the plaintiff, his only son. *G. Reade*, the devisee and trustee under *P. Rooke*’s will, by will, after devising certain lands in *Wiltshire* to his son *W. Reade* in fee, concluded thus:—“ And all the rest and residue of my ready money, and securities for money, stocks in the public funds, goods, chattels, real and personal estate and effects what-

(*a*) *Roe v. Reade*, 8 T. R. 118. 417. 10 Ves. 103. Butl. Co. Litt.
Lord Braybrooke v. Inskip, 8 Ves. 205 a (1) 5.

soever and wheresoever, and of what nature or kind soever, as well copyhold estates as all others, situate in the counties of *Wilts* and *Dorset*, or elsewhere in the kingdom of *England*, after payment of my debts, legacies, and funeral expenses, I give, devise, and bequeath unto my said son, *W. Reade*, his heirs, executors," &c. On this will of the trustee, the trust estate was, by the context, held not to pass under the residuary clause. "The lessor of the plaintiff," said Lord *Kenyon*, "claims the disputed fourth part as the heir at law of *G. Reade*, and he is entitled to it by descent, unless it were given away from him by the residuary clause in *G. Reade's* will. That clause is relied upon for this purpose by the defendants; and, undoubtedly, the words are sufficiently comprehensive to pass this fourth, if it can be collected from the will, that the devisor intended that it should thereby pass. In *Chester v. Chester* (a), it was holden, that a remote reversion passed by a general residuary clause, it appearing to be the testator's intention that it should pass. But all this doctrine was fully considered by this Court, and afterwards in the House of Lords, in the case of *Strong v. Teat* (b), where it was determined that the general words in a will may be restrained, in cases where it appears that the devisor did not intend to use them in their general sense. Now, in this case, the trustee (the devisor) had no beneficial interest in himself; he was a mere naked trustee although the use was executed in him; and when he set about to make a disposition of his property by his will, he used general words in the residuary clause, giving all his estates, 'after payment of his debts, legacies, and funeral expenses.' Now these latter govern and restrain the general effect of the former words, and shew that he only meant to give that in which

(a) 3 P. W. 56.

(b) 2 Burr. 912.

he had a beneficial interest, and which he had a power of charging with the payment of his own debts. But it is clear that he could not subject the estate in question to his own debts. This satisfies me that he had no idea of disposing of the trust estate; and therefore I think, on the authority of *Strong v. Teat*, that the estate in question did not pass by the residuary clause in this will." *Grose*, J. said, "I think that the description of the estates in the residuary clause is very important. The deviser had an estate of his own in *Wiltshire*, and another in *Dorsetshire*: in the residuary clause, he enumerates these by name; and the following words 'or elsewhere in the kingdom of *England*' must mean estates *ejusdem generis*, his own estates. And this construction is confirmed by the other words, 'after payment of my debts,' &c., which clearly shew that he did not intend to comprehend his trust estate" (a). In *Lord Braybroke v. Inskip*, it was a question, whether the legal estate passed to Lady *Alston*, by the will of Sir *Rowland Alston*, son and heir of the surviving trustee under the will of *Owen Thomas Bromsall*. Sir *Rowland Alston* by his will gave and devised all his real estates whatsoever and wheresoever to his wife, Dame *Gertrude Alston*, her heirs and assigns, for ever; and also gave all his personal estate and effects whatsoever and wheresoever, to his said wife; appointing her, and *George Brooks*, executors. It being contended that the legal estate did not pass by the will, but descended to the heirs at law of Sir *Rowland Alston*, and two of his co-heirs being infants, and another a feme-covert, an application was made under the statute 7 *Anne*, c. 19, for a reference to the Master, to inquire whether the infants were trustees within the act. The Master reporting, that the legal estate did

(a) 8 T. R. 118.

not pass by the will, and that the infants were trustees within the act; on a petition to confirm the report, and that the infants might join in the conveyance, *The Master of the Rolls* declared his opinion, that the legal estate did pass by the will, and the infants were not trustees within the act; and dismissed the petition. By Lord *Eldon*: "I am disposed in this case to concur with the opinion of *the Master of the Rolls*; meaning rather to state my judgment, that the rule is not, that in every case, where general words are used, the property shall or shall not pass; but, that in each case you must look at every part of the will for the intention with regard to such property. I do not know in experience any case, in which the proposition is laid down so strong, one way or the other, as it was laid down in the *Attorney General v. Buller* (a). I know no case which states as the rule, that trust estates shall not pass under general words, unless an intention that they should pass appears; and I incline to think they will pass, unless I can collect from expressions in the will, or purposes or objects of the testator, that he did not mean they should pass. In this case, there is no circumstance, except one that I shall observe upon, denoting any special intention. It is the case of a dry trust; all the debts and legacies being long paid. There was therefore a pure legal estate in this testator; nothing remaining to be done but to reconvey. There is no one circumstance in this will to cut down the general effect upon any notion of intention; unless it can be said that, where he meant to create a trust, namely, as to the personal estate, he joins another person with his wife; giving the real estate to her alone. But that is too thin an evidence of intention to afford much inference.

(a) 5 Ves. 339.

The result is this: on a will containing words large enough, and no expression in it authorizing a narrower construction than the general legal construction, nor any such disposition of the estate as is unlikely for a testator to make, of any property not in the strictest sense his, nor complicated limitations; nor any purpose at all inconsistent with as probable an intention to vest it in his wife, as devisee, as to let it descend; I know of no case in which a mere devise in these general terms, without more, where the question of intention cannot be embarrassed by any reasoning upon the purpose, or objects, or on the person of the devisee, has been held not to pass the trust estate. If there was any such case, I would abide by it; but I do not feel strong enough, upon authority or reasoning, to dissent from the decision of *the Master of the Rolls*, Lady *Alston*, therefore, has in her the legal estate" (a).

SECTION XXII.

Of a Devise by a Donee of a Power.

UNDER this head will be considered, first, a devise by a donee of a power, having also an estate in fee in the land; and, secondly, a devise by a donee of a power, who has not an estate in fee in the land.

It frequently happens, that a person has an estate in fee in land; and, farther, a power of appointment of the same land. On a will by him, it is often a question if he has intended to devise under the estate, or under the power; in other words, if he has intended to devise, or to appoint.

It is among the resolutions in *Sir Edward Clere's* case "If a man, seised of lands in fee, makes a feoffment to

the use of such person and persons, and for such estate and estates, as he shall appoint by his will; by operation of law, the use doth vest in the feoffor, and he is seised of a qualified fee, that is to say, until declaration and limitation be made according to the power. When a man makes a feoffment to the use of his last will, he has the use in the meantime. If, in such case, the feoffor by his will limits estates according to his power reserved to him on the feoffment, there the estates shall take effect by force of the feoffment, and the use is directed by the will; so that in such case the will is but declaratory. But if in such case, the feoffor, by his will in writing, devises the land itself, as owner of the land, without any reference to his authority, there it shall pass by the will; for the testator had an estate deviseable in him, and power also to limit a use, and he had election to pursue which of them he would; and when he devised the land itself, without any reference to his authority or power, he declared his intent to devise an estate as owner of the land by his will, and not to limit a use according to his authority" (a). To the same effect is the language of the Lord Chief Justice *Hobart*, who, on the authority of Sir *E. Cleer's* case, has said: "If an act will work two ways, the one by an interest, the other by an authority or power, and the act be indifferent, the law will attribute it to the interest, and not to the authority." "Where interest and authority meet, if the party declare clearly, that his will is, that this act shall take effect by his authority or power, there it shall prevail against the interest" (b). The Lord Chief Justice *Holt*, also, has said: "When one has an authority, and does an act which can be good no other way but by virtue and in pursuance of that authority,

(a) 6 Co. 18. Sir *E. Cleer v. also Browne v. Taylor*, Cro. Car. 38.
Parker, Cro. Eliz. 877. S. C. See (b) *Hob. 159, 160.*

it shall rather be understood to have been by force of his authority than void; although in doing the act he takes no notice of his authority. But where one has an interest and an authority together, and he does an act generally, it shall be construed in relation to his interest, and not to his authority. And this is the very point of *Clere's* case. He was seised in fee of three acres of land *in capite* [by knight service], of equal value, and made a feoffment in fee of two of them, to the use of his wife for life, for her jointure; and of the third acre to the use of such person and persons, and of such estate and estates, as he should devise by his last will; and after by his will devised the said third acre, without any notice taken of his power reserved upon the feoffment. Now, if they had been three acres of land in socage, and he had made such a feoffment, and after devised the third acre without reference to his power, it had passed by the will; because then it might either pass, by virtue of his interest, by the will, or his authority by the feoffment; but being *capite* [knight-service] lands, which could not pass but by the authority, because he had passed two parts by act executed (a), this devise was construed to be an execution of his authority, because otherwise the devise had been to no purpose (b). These principles are adopted in the exposition of wills at the present day (c).

If, then, a person, who has an estate in fee in land, and also a power of appointment of the land, devises, by name, the particular lands; or devises in any general terms, as in the words, 'I devise all my messuages, tenements, lands, hereditaments and premises to A.;' the devise is interpreted to be a devise, and not an appointment, unless, by the context, it appears to be the intention of the testator to

(a) See Co. Litt. 111 b.

(c) 5 Barn. & C. 730: 6 (1)

(b) 12 Mod. 469.

appoint under the power (a). The question if a devise is to be considered as a devise, or as an appointment, is often, it may be observed, of importance to remainder-men, who by means of the appointment may be shut out and deprived of the estate in remainder.

In *Powell v. Loxdale*, *Martha Powell* devised all her messuage, tenements, and farm, with the lands, hereditaments, and appurtenants thereunto belonging, in *Westley* in the county of *Salop*, and all other the messuages, lands, tenements, and hereditaments that she should be seised or possessed of, unto her brother *John Powell*, and the heirs of his body; and, for default of such issue, to such uses, &c., as he the said *John Powell*, by any deed or writing, or by his last will and testament, duly executed in the presence of three or more credible witnesses, should appoint the same; and, in default of such appointment, she devised the same to *John Kynaston Powell*, and the heirs of his body; and, in default of such issue, to his brother, *Edward Kynaston*, and the heirs of his body; and, in default of such issue, to the right heirs of the said *John Powell*. *John Powell* had in the life-time of the testatrix made his will, whereby he devised all his manor of *Worthen* in the county of *Salop*, and all his lands and premises situate in the parish of *Worthen*, and elsewhere, in the county of *Salop* [to various uses]. When, after the death and under the will of *Martha Powell*, *John Powell* became seised of the estate and premises at *Westley*, he published a codicil to his will in these words: "Whereas I have in my last will devised all that my manor of *Worthen*, in the county of *Salop*, and hereditaments situate in the parish of *Worthen*, and elsewhere, in the said county (after several estates for life, and in tail, therein mentioned are deter-

(a) 6 Co. 18. *Browne v. Taylor*, 2 Barn. & A. 291.
lor, Cro. Car. 38. *Powell v. Lox-*

mined) to my right heirs. Now, I do hereby revoke and make void the said gift and devise to my right heirs, and I do, in lieu thereof, give and devise the ultimate reversion in fee of all my said estates in the parishes of *Worthen*, *Westbury*, and *Cherbury*, in the said county of *Salop*, to my nephew, *John Kynaston Powell*, named in my will, and his heirs. And I do hereby confirm my said will, and all matters, in every other respect." *John Powell* had not any estate in the parish of *Westbury*, except the said farm and premises at *Westley*, devised to him by the will of *Martha Powell*, which is situate in the parish of *Westbury*; and he died without issue.

On this case, the court of King's Bench returned a certificate to the court of Chancery, that the power of appointment given to *John Powell*, by the will of *Martha Powell*, was not well executed by the codicil to his will; and that *John Kynaston Powell* took an estate-tail to him, and to the heirs of his body, in the *Westley* estate (a).

IF a person who has a power of appointment of land, but has not an estate in fee in it, devises, by name, the particular lands, the devise will be considered an appointment, although the power is not referred to in the will.

In *Morgan v. Surman*, a testator devised all that his messuage, or malt-house, and garden, in the parish of *Upton Snodsbury*; likewise, all that house, with the garden and orchard thereto adjoining, known by the name of the *Red Lion*, in the parish aforesaid, to his wife, *Eleanor Surman*, for her natural life. All the residue of his real and personal estate whatsoever, whereof he had not by that his will disposed, he gave to his wife, for her to receive the rents and profits thereof to her own use, and to

maintain her children, during her natural life. And, after her decease, he gave and bequeathed the same to his children, to be parted among them as she should think proper. *Eleanor Surman*, the widow, devised to her two youngest sons, *James* and *Francis*, all that her freehold messuage, tenements, and premises, in which she then lived, together with the malt-house, all which premises were then in her occupation, and known by the sign of the *Red Lion*, at *Upton Snodsbury*. This devise the court of Common Pleas held to be a good appointment under the power. "It has been said," said Sir *James Mansfield*, "that this is not a good execution of the power, because the testatrix disposes of the property as her own. It is true, that where a person, having an interest and a power, does not refer to the power, it shall be held that he means only to dispose of his interest: but where *A.* is seised of an estate, with a power for *B.* to appoint; there *B.*, having no estate, his act shall necessarily be inferred to be done in execution of the power. In a case where a woman devised her real estate, having none, but a power to appoint a real estate of her husband's, Lord *Loughborough* held it was a good execution of her power. The testatrix [in the present case], then, taking as she did only a life interest in the real estate, certainly had only a power over the reversion, and not an interest in it. And, therefore, although she uses terms of devise, it is plain that she meant to execute the power" (a).

If a person, who has a power of appointment of land, but has not an estate in fee in it, devises in any general terms; as in the words, I devise all my messuages, tenements, lands, hereditaments, and premises to *A.*; the devise is interpreted to be a devise, and not an appointment,

unless, by the context or collateral evidence, it appears to be the intention of the testator to appoint under the power.

A donee of a power, not having an estate in fee in the land, has been held to devise, and not to appoint, in the following cases:—

Roe v. Reade, the particulars of which case have been before stated in the present chapter (a). In *Ex parte Caswall*, Sir George Caswall surrendered a copyhold estate at *Woodford*, in *Essex*, to trustees, to the use of his wife for life; and, after her death, to pay the rents and profits to all his children, equally; and then in trust to such use or uses as Sir George should, by deed or will, appoint; and, for want of appointment, then to his son, *John Caswall*, and his heirs. Sir George Caswall made a will, in which was the following clause: “As to all the rest, residue, and remainder of my effects, real and personal, of what nature, kind, or quality soever, I give to my son, *George Caswall*.” By Lord *Hardwicke*: “The question is, whether this be a good execution of the power. As I am at present advised, I am of opinion it is not. The material thing is the limitation over of the copyhold in the surrender. What is the effect of that? Why, there is an estate actually vested in *John Caswall*, and nothing but an appointment executed could divest it out of him; and this would have been the construction if it had been a legal estate; and although it is a trust estate, yet in this Court it ought to be considered and construed in the same manner; and, therefore, is no more than an estate for life to Sir George Caswall, remainder in fee to *John Caswall*, subject to be defeated on a proper appointment by Sir George Caswall. Sir George Caswall had other lands, by which the devise to *George Caswall* might

(a) Section xxi.

be satisfied. Here is nothing that is at all descriptive of the thing which Sir *George Caswall* had a power to dispose of, but what is applicable to other estates of which Sir *George* was seised, and of which he could equally dispose" (a). In *Doe v. Bird*, it appears that on the marriage of the defendant's father, a settlement was made, by which an estate was settled, after the father's life, to the use of such child or children of the marriage, and for such estates, &c., as the father by his will should appoint; and, in default of appointment, to be divided amongst all the children, as tenants in common. The father died, having made a will, in which, by a residuary clause, he devised all the rest, residue, and remainder of his messuages, lands, &c., and personal estate, &c., after payment of his debts, legacies, and funeral expenses, to his son *John Bird*, the defendant. The testator had other lands besides the settled lands; and the question was, whether the residuary clause passed the settled lands, as well as the other lands. The court of King's Bench was of opinion, that the power was not executed by the will. "There is nothing in it," it was said, "referring, in any manner, to the power, nor from whence his intention to execute it could be inferred: and the charge of debts and funeral expenses on the lands, &c. devised shewed his intention to pass such lands only as were subject to those charges" (b). In *Coates v. King*, decided in 1821 before the Privy Council, *Alexander Coates* divided, by will, his real property in *Antigua*, among his three sons, with power to one of them to dispose, by will, of his share. The son, being possessed of considerable real and personal estates in *Antigua*, independent of that given by his father's will, devised in these terms, "All my real estates in *Antigua*, and all other my real estate, whatsoever and wheresoever;" and it

(a) 1 Atk. 559.

(b) 11 East, 49.

will held that the will did not pass that property, over which he had the power (a). *Denn v. Roake* was an ejectment for lands in the county of Surrey. *T. Scott*, and *Sarah* his wife, and *Henry Roake*, and *Elizabeth* his wife, by lease and release conveyed the premises in question, to one *Hill*, for the purpose of suffering a common recovery. And it was thereby declared, that the recovery should enure, as to one undivided moiety of the premises, to the use of *T. Scott* for life; remainder to the use of *Sarah Scott* for life; remainder to the use of such person and persons, and for such estate and estates, as the said *Sarah Scott* should, by any deed or writing, or by her last will and testament, from time to time, direct, limit, or appoint; and, for want of such appointment, to the use of all the children of *T. Scott*, and *Sarah* his wife, as tenants in common in tail; and, for default of such issue, to the use of *Elizabeth Roake* for life; remainder to her children as tenants in common in tail; and, for default of such issue, to the use of *T. Scott* in fee. And there were corresponding limitations, as to the moiety of which *Henry Roake*, and *Elizabeth* his wife, were seised. A recovery was accordingly suffered. *T. Scott* died without issue, leaving *Sarah* his wife him surviving. *Sarah Scott* afterwards intermarried with *John Trymmer*, who died, leaving his wife him surviving. *Elizabeth Roake* died, leaving *Henry Roake* her husband, and *John Roake*, her son and only child, her surviving, and without having made any appointment. By lease and release (the release reciting a contract between *Sarah Trymmer* and *John Roake*, for the purchase of his moiety of the premises, subject to the life-estate of his father), *H. Roake*, and *J. Roake*, conveyed the premises for the purpose of suffering a common recovery to the use of *H. Roake* for life; remainder to *S. Trymmer* in fee.

(a) Cited 5 Barn. & C. 726.

Sarah Trymmer afterwards made her will, and devised in the words: "I hereby give and devise all my freehold estates in the city of *London*, and county of *Surrey*, or elsewhere, to my nephew *John Roake* for his life, on condition that out of the rents thereof he do from time to time keep such estates in proper and tenantable repair; and, on the decease of my said nephew *J. Roake*, I devise all my said estates (subject to and chargeable with the payment of 30*l.* a year to *Ann*, the wife of the said *J. Roake*, for her life), to and amongst his children, equally at the age of 21, and their heirs, as tenants in common; but if only one child should live to attain such age, to him or her, and his or her heirs, at his or her age of 21." And, for default of issue of *J. Roake*, to certain other persons in the will mentioned. *S. Trymmer* had not, at the time of making her will, or at the time of her death, any other freehold lands in the county of *Surrey*, than those mentioned in the declaration. On this case, the court of King's Bench, in error from the court of Common Pleas (*a*), and reversing the judgment below, held that the will of *Sarah Trymmer*, did not operate as an execution of her power of appointment, and passed that moiety only of the premises of which the testatrix was seised in fee (*b*). An important part of the judgment, which was delivered by the Lord Chief Justice *Abbott*, appears to be, the consideration of the Court, that although it could be inferred that the testatrix meant to give the entirety of the lands in *Surrey*, still it will not necessarily follow that she intended to execute her power. This part of the judgment is as follows: "The question then is, whether it can be safely and clearly inferred, that the testatrix intended to execute her power. Now it appears by the will that the testatrix had estates in *London*, or at least supposed she

(*a*) *Doe v. Roake*, 2 Bingham, 497. (*b*) 5 Barn. & C. 720.

had, and made her will upon that supposition. And we see nothing repugnant to reason, or to the ordinary sentiments and intentions of mankind, in supposing that a person having estates in *London*, and an undivided moiety only of estates in *Surrey*, might make a will containing such an injunction as the present [to keep the estates in repair], leaving that injunction to take effect as far as by law it could. And even if it should be inferred from this part of the will that the testatrix meant thereby to give the entirety of the lands in *Surrey*, still it will not necessarily follow that she intended to execute her power, and this for the reason hereafter mentioned. So if the extrinsic facts should lead to an inference that the testatrix cannot have intended to make a strict settlement of the purchased moiety upon the family of her sister, and leave that which was originally her own unsettled and undisposed of; still, in our opinion, it will not necessarily follow that she intended to execute her power. It may be that she intended the will to work by her interest in the tenements. It may have happened that she had entirely forgotten the settlement, and supposed at the making of her will that she was then seised of the entirety of the estates in fee, as but for that settlement she would have been. The settlement was made in the life of her first husband, 33 years before the date of her will. The only fact upon the special verdict, shewing that this settlement was ever thought of in the interval, is the release under which she purchased her sister's moiety in 1775, by which that moiety was conveyed for the purpose of suffering a recovery. This took place eight years before the date of her will, and no recovery was suffered till after her death, although she lived eleven years, and must have been in possession of this moiety for nine years; the tenant for life, her sister's husband, having died in 1775. It appears to us to be, at least, as probable that she had forgotten the

settlement, and intended the will to work by an interest, as that she intended to execute the power contained in the settlement; and even more probable, because the language of the will is exactly such as would be used by a person who at the time supposed herself to have an estate in fee in the entirety of the tenements, and not such as would be used by a person who was conscious that she had a power only over one moiety, and a seisin in fee of the other. Although, therefore, we may think the testatrix intended that the entirety should go in strict settlement on the family of her sister, yet we think it is possible to suppose that the testatrix had no intention to execute the power. And if the intention to execute the power be doubtful, the will cannot, in our opinion, be deemed to be an execution of it (a)." The point determined in *Sir Edward Clere's* case being, that if a person, who has a power of appointment, devises land without reference to the power; if the devise will be void unless it enures as a limitation of a use, the devise shall operate not as a devise but as an appointment; it is respectfully proposed, that, if from the will in *Denn v. Roake*, and collateral evidence, it can be inferred the testatrix supposed herself seised in fee of *both* moieties of the estate; and, farther, it can be collected, that she intended to dispose of the *entirety* by her will; the devise of this testatrix might, by the same benignity (b) of the law which determined the case of *Sir Edward Clere*, operate as an appointment, although the testatrix, mistaking her interest in the land, intended to devise. In *Sir Edward Clere's* case, the testator, in ignorance of the law, intended to dispose of the acre in question by devise, which, however, by the Statute of Wills, he was not entitled to do. The will, therefore, in that case, notwith-

(a) 5 Barn. & C. 733.

(b) Hob. 160.

standing the testator's intention to devise, was construed to be a limitation of a use under the feoffment. If, then, in *Denn v. Roake*, it can be collected, that the testatrix intended to dispose of both moieties of the land, but, in ignorance of her power of appointment, intended to dispose of them by devise, would it not be in agreement with Sir *Edward Clere's* case, to determine the intended devise of the moiety in question, to be an appointment under the power in the settlement?

A PERSON having a power of appointment, but not an estate in fee in the land, has been held to appoint, and not to devise, in cases where neither the particular lands subject to the power were mentioned, nor the power referred to, on the collateral evidence that the testator had no other lands to satisfy the words of the will.

In *Standen v. Standen*, *Charles Millar* directed his real estate to be sold; and gave the money arising from the sale, in trust for his wife for life; and, after her decease, as to one moiety, for such person or persons as she should, by any deed or writing, or by will, with two or more witnesses, appoint; and for want of appointment, then over.

The real estate was not sold. The testator's widow received the rents and profits for her life; and by her will disposed of the residue of her property, in the words:—

"All the rest, residue, and remainder of my estate and effects, of what nature or kind soever, and whether real or personal, which I shall be possessed of, interested in, or entitled to, at the time of my decease, subject to, and after payment of, all my just debts, funeral expenses, and specific legacies, I give to my friend, *Samuel Howard*, for his own use and benefit." The will was attested by three witnesses. The testatrix had no other real estate than that directed by her husband's will to be sold; and

Lord Loughborough held her will to be an appointment. "Take it," he said, "according to the strict technical rule in *Sir Edward Clere's* case, that a general disposition will not dispose of what the party has only a power to dispose of, unless it is necessary to satisfy the words of the disposition. Mrs. Millar had no other real estate. I am bound to satisfy all these words upon the technical rule. I can satisfy them no other way (a)." *Jones v. Curry* is an important case on this subject; the general words in the will of a donee of a power, "All my estate and effects, of whatever denomination," being there held to be satisfied by the *personal* property of the testatrix. It appears that one *William Browne* devised to trustees a moiety of certain freehold hereditaments, and he directed them to pay the rents to *Isabella Common* for her life; and, after her decease, to convey, assign, transfer, &c., the premises equally amongst her children; and, in default of such children, he directed that his said freehold premises should go to such person or persons to whom she should by her last will and testament give, devise, and bequeath the same. *Isabella Common* died without issue. By her will, executed and attested so as to pass real estates, she devised:—"I give and bequeath unto my father and mother, *Thomas* and *Ann*, all my estate and effects, of whatever denomination." "The question," said the Master of the Rolls, *Sir Thomas Plumer*, "is, whether so far as the real estate is concerned, an intention to exercise her power can be collected from the will, and from the extrinsic evidence, to which, on the subject of realty, the Court is permitted to resort. On that point, there is a shade of novelty in this case; but, notwithstanding an anxiety to support the will, I should not feel justified in pronouncing a judicial opinion that the testa-

(a) 2 Ves. jun. 589.

trix designed to pass this real property. The case of *Standen v. Standen* has established, that, with regard to real estate, the Court may examine whether the circumstances of the testator's property are such as to give effect to the will ; and if this will had contained an unequivocal devise of realty, the Court, under the authority of that decision, must, in order to give operation to an instrument, which would otherwise be inoperative, have resorted to the fund, the subject of the power. But this will contains no words which will be without operation unless referred to the power. Although the testatrix had no real estate, she might have personal property of various descriptions, and the terms would be satisfied by passing that" (a). In *Lewis v. Lewellyn*, certain freehold and copyhold estates were limited, in a marriage settlement, to the use of *Morgan Lewellyn* for life, remainder to the use of *Margaret Williams* for life, remainder to the use of such person or persons, and for such estate and estates, and for such trusts, intents, and purposes, and charged and chargeable in such manner and form, as the said *Morgan Lewellyn*, by any deed or deeds, &c., or by his last will and testament, should direct, limit, or appoint. *Morgan Lewellyn* afterwards, by his will, executed to pass freehold estates, directed that all his just debts should be paid, as soon as conveniently might be after his decease, and charged all his freehold, copyhold, and leasehold estates thereafter mentioned, with the payment thereof ; and, subject thereto, he devised and bequeathed all his real and personal estates to his brother, *Charles Lewellyn*. The testator had no other copyhold estates except those which were comprised in the settlement ; but he had other freehold estates. On a bill filed by the creditors, the will

(a) 1 Swanst. 66.

was held to be an execution of the power as to the copyhold estates, but not as to the freehold estates subject to the power. By *Best, Justice, for the Master of the Rolls*: "The question in this case is, whether the clause cannot be divided, and considered as operating in one sense with respect to the copyhold, and in another with respect to the freehold. If it can, and the case of *Standen v. Standen* is rightly decided, I think it applies strictly to this case. The will does not refer to the power; but the question is, whether it does not refer to the estate. It refers to the estate in clear and unequivocal terms; and as the rule is, that all the words of a will, should, if possible, have effect; and these words with respect to copyholds cannot be satisfied by any thing short of considering them an execution of the power, *ut res magis valeat quam pereat*, they should be so construed. That is the general principle of *Standen v. Standen*; and we must look only to the general principle, for it is impossible to find two cases precisely alike. The principle is, that where there is nothing for the will to operate upon, but with reference to the power, it must operate as an execution of the power. For these reasons, I am of opinion, that the will is an execution of the power as to the copyholds" (a).

THE cases cited in the margin (b) are applicable to the

(a) Turn. Rep. 104.

(b) Probert v. Morgan, 1 Atk. 440. Molton v. Hutchinson, *ibid*, 558. Maddison v. Andrew, 1 Ves. 58. Andrews v. Emmett, 2 Bro. C. C. 297. Buckland v. Barton, 2 H. Bl. 136. Hales v. Magerum, 3 Ves. 299. Langham v. Nen-

ny, *ibid*, 467. Roach v. Haynes, 6 Ves. 153; and 8 Ves. 584. Nannock v. Horton, 7 Ves. 391. Bennett v. Aburrow, 8 Ves. 609. Bradley v. Westcott, 13 Ves. 445. Sloane v. Cadogan, Sugd. Vend. & P. 6th edit. Appendix, No. xxiv. Jones v. Tucker, 2 Mer. 533.

224 OF PRESUMING THE TECHNICAL EFFECT OF THE
subject of the present section. They have been deter-
mined on questions of appointments by will of *personal*
property.

SECTION XXIII.

Of a Devise to Executors to pay Debts.

ON a devise to executors for the payment of debts, and until the debts are paid, the executors take a chattel estate in the lands, and not a freehold estate, nor a term of years.

In *Sir William Cordell's* case, *Sir William Cordell*, Master of the Rolls, devised his manor of *Melford*, &c., in the county of *Suffolk*, to his executors, for the payment of his debts, and until his debts should be paid; remainder to *Edward*, his brother, &c. After the testator's death, the debts were paid, and his [*Edward's*] wife demanded dower; and it became a question what interest or estate the executors had; for if they had a freehold, then the wife should not have dower; and if they had but a chattel, determinable on the payment of the debts, then she should be endowed: and it was resolved, "that the executors had but a chattel, and no freehold; for if they should have a freehold for their lives, then their estate would determine by their death, and not go to the executors of the executors, and so the debts would remain unpaid; but the law adjudges it a particular interest in the land, which shall go to the executors of the executors, as assets for payment of the debts" (a).

(a) Cited 8 Co. 96. *Cordell's* varra's case, cited 8 Co. 96. See case, Cro. Eliz. 316. S. C.; Gualtero's case, cited 8 Co. 96. See also Co. Litt. 42 a.

A testator frequently wills, his debts to be paid by his executors, by a sale of his land. In these cases, at some times becomes a question, if the testator has intended, to devise the land, with the legal estate in it, to the executors; or, he has intended to give to them only a power to sell, and, consequently, supposing the testator to be seised in fee, to leave, until the sale, the legal estate in fee in the heir at law.

There is a distinction between a devise in the words, I devise my lands to my executors to sell, and a devise in the words, I devise (or will (a)), that my executors shall sell my lands, or, I devise that my lands shall be sold by my executors, or, I devise my lands to be sold by my executors. Of the two devises, the former appears to be understood to express, that the testator intends to give the land, and the legal estate in it, to the executors; the latter, that he intends to give the executors but a power to sell. It is stated in the Year Books:—"If a man devises his land to his executors to sell, the heir cannot enter (*medler*); but if he devises his land to be sold by his executors, there the heir may enter, and take the profits until the executors have sold, and, after the sale, the purchaser may enter on the heir" (b). "If a man devises his land to be sold by his executors, and dies, and his heir enters, and dies seised, and his heir enters by descent, yet the executors may sell the land, according to the will of the devisor" (c). "If a man devises his land to be sold by his executors, and dies, the heir enters, and afterwards is disseised, yet the executors may sell, and the purchaser may enter. The same law, if the heir suffers a recovery, or levies a fine" (d). It is likewise said by *Littleton*: "Also a man may devise by his testament, that his executors may alien and sell the

(a) 2 Burr. 1031.

(c) *Ibid*, 32.

(b) Bro. Abr. *Devise*, 5.

(d) *Ibid*, 36.

tenements that he hath in fee-simple, for a certain sum to distribute for his soul. In this case, although the devisor die seised of the tenements, and the tenements descend unto his heir, yet the executors, after the death of the testator, may sell the tenements so devised to them, and put out the heir, and thereof make a feoffment, alienation, and estate by deed, or without deed, to them to whom the sale is made. And so may ye here see a case, where a man may make a lawful estate, and yet he hath nought in the tenements at the time of the estate made" (a). It is also stated by *Perkins*: "If a man, seised of lands in fee, willeth by his testament, that his executors shall sell the same land, and distribute the profits coming thereof for his soul, and the devisor dieth; now the inheritance shall descend unto the heir, and shall continue in him until they, namely, the executors, sell, &c., and then the executors may enter, &c., and thereof enfeoff the vendee according to the sale. But if lands deviseable are devised unto the executors for to sell, &c.; in this case, the executors, after the death of the devisor, may enter into the lands, &c., because they were devised unto them" (b). In *Houell v. Barnes*, a person, seised of land in fee, devised it to his wife for her life; and after her death, ordered the same to be sold by his executors. On this will, the court of King's Bench held, that the executors had not any interest by this devise, but only an authority (c). In *Lancaster v. Thornton*, a person being seised in fee of land, and possessed of other lands for a term of years, devised as follows:—"I do hereby charge, and make chargeable, all and every my lands, and inheritance, and leasehold, with the payment of my debts, funeral expenses, and legacies; and, for more speedy raising money for payment of them, I devise to *George, Edmund*, and

(a) Litt. s. 169. See Co. Litt. 112 b, and 181 b.

(b) Perk. 541, 542.

(c) Cro. Car. 382.

Dorothy Lancaster, their heirs, executors, and administrators [the leasehold premises], for all the residue of the term therein to come, &c.; upon trust to sell the same &c. But in case the money arising from the sale of the leasehold estate shall not be sufficient to pay and discharge all my debts, legacies, and funeral expenses, then I devise that my said two sons and daughter shall and may absolutely sell, mortgage, or otherwise dispose of my freehold estate, for the payment of such of my said debts, legacies, and funeral expenses, as my said leasehold estate shall not be sufficient to pay and discharge." The testator appointed his sons *Edmund* and *George*, and his daughter *Dorothy*, his executors. It was held, that no estate in the freehold lands passed to the executors, but only a power to sell. "Here are no words," said Lord *Mansfield*, "by which the [freehold] estate is devised to the executors. Therefore, if it be construed, that there is a devise to them, it must be raised by implication. But, by the frame of the will, it is plain that the testator did not so intend; for he shews, by the expressions he has used, that he knew the distinction between a devise of an estate to them, and giving them only a power to sell. As to the term 'devise,' the expression 'I devise' is here synonymous to saying 'I will,' or 'my mind is'"(a).

Sir *Edward Coke* has considered a devise in the words, I devise my lands to be sold by my executors, to be all one with a devise in the words, I devise my lands to my executors to be sold. He says, "In this section [Litt. s. 383] is implied a diversity, viz. when a man deviseth that his executors shall sell the land, there the lands descend, in the meantime, to the heir; and, until the sale be made, the heir may enter, and take the profits. But when the land is devised to his executors to be sold, there the devise

(a) 2 Burr. 1027.

taketh away the descent, and vesteth the estate of the land in the executor, and he may enter and take the profits, and make sale according to the devise. And here it appeareth, by our author, that when a man deviseth his tenements to be sold by his executors, it is all one as if he had devised his tenements to his executors to be sold. And the reason is, because he deviseth the tenements, whereby he breaks the descent" (a). It is much, however, to be doubted, if the section Sir *Edward Coke* refers to in *Littleton*, authorises the opinion he has formed from it; which opinion, moreover, appears to be in terms opposed by the passage in the Year Books, which has been transcribed from *Brook's Abridgment*, *Devise*, 5. There is reason to think that, at the present day, the two devises may be considered to be different; that the latter will pass an estate to the executors, the former only a power (b).

PERSONAL property is, at law and in equity, the first fund for the payment of a testator's debts, unless an intention is discovered in the will to charge them first on the real estate. A testator may, if he pleases, charge his real estate alone with the payment of his debts; and if, the whole will taken together, this intention can be collected, the personal property of the testator will be exempted from the payment of them, until the real estate, supposing it insufficient, is exhausted (c).

On this subject there is an elaborate judgment of Lord *Eldon*, in *Bootle v. Blundell*.—

"The question," said his Lordship, "which the Court is now called upon to determine, is, whether, according to the true intent and meaning of this will, collected from the

(a) Co. Litt. 236 a.

(c) *Bootle v. Blundell*, 1 Mer.

(b) See Co. Litt. 236 a, Lord Nott. note (1), & Sugd. Powers, 3rd edit. 111.

193. 1 Swanst. 28. *Greene v. Greene*, 4 Mad. 148. *Michell v. Michell*, 5 Mad. 69.

settled principles of the Court, and the rules of law, the personal estate of the testator is to be considered as exempt from the payment of his debts.

“In order to determine what are those principles, and those rules, the several cases on this subject have been referred to in the course of the argument; and, on the part of those who contended that the personal estate is not exempted, I am pressed to consider this to be the rule of interpretation; namely, that the intention of the testator to exempt must be manifested in such a manner, as that persons out of Court, on reading his will, cannot fail to agree that such was his intention.

“Upon looking through the several cases which have been decided during the period of more than a century past, I think I should have been authorised to say, at the commencement of that period, that, if such a rule were laid down, there could never, in all human probability, be any decision upon a will furnishing a solution of this question; and now, at the close of it, I think I am authorised to say, that that which it was then probable would be the fact, is the fact; for on a comparison of all the cases which have arisen, it is scarcely possible to find any two in which the Court altogether agrees with itself; there being scarcely a single circumstance that is considered in one case as a ground of inference in favour of the intention, but it is considered, in other cases, as against the same inference; and I can find no rule deducible from all that has been said on the subject, but this (which appears to be a rule supported by all the cases taken together), namely, that since it has been laid down that express words are not necessary to exempt the personal estate, there must be in the will that which is sometimes denominated “evident demonstration,” sometimes “plain intention,” and “necessary implication,” to operate that exemption.

“Thus much can be collected from the cases ; but when you proceed farther, and inquire what it is that constitutes this “evident demonstration,” “plain intention,” and “necessary implication,” it does appear to me that Lord *Alvanley* is right when he says, You are not to rest on conjecture, but the mind of the judge must be convinced, that he is deciding according to what the testator intended. The expression “necessary implication,” is frequently applied to cases between a devisee and heir at law ; and yet there is hardly a case decided against an heir at law, where the implication, upon which it was so decided, was of absolute necessity. It is but a loose way of defining this expression, to say that the intention must be so probable that the judge cannot suppose the contrary ; and it seems strange to lay down as a rule that express words shall not be required, but yet that there must be expressions tantamount to express words. I take it that this is what will be found to be the result of all the cases : that the judge is in every instance to look at the whole of the will together, and then ask himself whether he is convinced that it was the testator’s intention to exempt his personal estate. Many rules are clear and positive. First, it is certain that in equity, as well as at law, the personal estate is first liable ; and that the amount of the personal estate, whatever it may be, makes no difference in the case. I take it to be certain, also, that it is not enough for the testator to have charged his real estate with, or in any manner devoted it to, the payment of his debts ; that the rule of construction is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged. Then, on the question whether the personal estate is discharged or not, I apprehend it will be found that the very same circumstances have, in the minds of different judges, led to different conclusions. And this is the result to be

drawn from the most diligent comparison of all the cases." His Lordship then observes on the cases in the margin (*a*); and proceeds: "Then it comes to this,—upon each particular case, as it arises, the question will be, does there appear, from the whole testamentary disposition taken together, an intention on the part of the testator so expressed, as to convince a judicial mind that it was meant, not merely to charge the real estate, but so to charge it as to exempt the personal? For, it is not by an intention to charge the real, but by an intention to discharge the personal estate, that the question is to be decided" (*b*).

SECTION XXIV.

Of a Devise, and a Trust in the Devisee to devise.

LAND is often devised to a person who is intended by the testator to have the enjoyment of the property for his life; but, by the will, he is entrusted by a desire (*c*), request (*d*), hope (*e*), or confidence (*f*), of the testator, to devise the land, at his death, to the parties the testator names. In these cases, farther than his own life estate, the devisee is construed to be a trustee for the devisees over. Yet it appears a trust will not be considered to be created by a will of this description, if either, in consideration of

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| (<i>a</i>) Lord <i>Inchiquin v. French</i> ,
Amb. 33; 1 Wils. 83; 1 Cox Ch.
C. 1. <i>Stapleton v. Colville</i> , Forr.
202. <i>Walker v. Jackson</i> , 2 Atk.
624. <i>Duke of Ancaster v. Mayer</i> ,
1 Bro. C. C. 454. <i>Stephenson v.</i>
<i>Heathcote</i> , cited 1 Bro. C. C. 458;
reported 1 Eden, 38. <i>Tait v. Lord</i>
<i>Northwick</i> , 4 Ves. 816. <i>Burton</i>
<i>v. Knowlton</i> , 3 Ves. 107. <i>Brum-</i> | <i>mel v. Prothero</i> , <i>ibid</i> , 113.
(<i>b</i>) 1 Mer. 218—230.
(<i>c</i>) <i>Eacles v. England</i> , 2 Vern.
466.
(<i>d</i>) <i>Pierson v. Garnet</i> , 2 Bro. C.
C. 38; See 1 Bro. C. C. 142, 143.
(<i>e</i>) 1 Bro. C. C. 144.
(<i>f</i>) <i>Massey v. Sherman</i> , Amb.
520. |
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law, the parties to be the devisees over are too indefinitely named by the testator; or, secondly, the devisee is not unauthorised to dispose of the property, if he pleases, in his life-time. It farther appears, that words merely of *advice* or *recommendation* to a devisee, to leave the land, at his death, to particular persons, are not considered to be sufficient to create a trust in the devisee to devise to them.

The following are cases in which a trust has been held to be created in the devisee to devise :—

In *Eacles v. England*, a person bequeathed in the words: “I give unto my loving kinsman, *Richard Hammerton*, the sum of 300*l.*, 100*l.* part whereof he doth owe me; which I do intend to give to my cousin, *Susan Hammerton*, his youngest daughter; but my will and desire is, that he will give the said 300*l.* unto his daughter *Susan*, at the time of his death, or sooner, if there be occasion for her better advancement and preferment.” *Richard Hammerton* died before the testatrix. *Susan*, the daughter, died at the age of sixteen, and unmarried. The plaintiff’s wife was administratrix to her. It was decreed, that the 100*l.* bond to the testatrix should be assigned to the plaintiffs, and the 200*l.* paid with interest from the exhibiting of the bill (a). In *Mason and Limbery*, the words of the will were, “I give to my brother, *Robert Mason*, 2000*l.*, which I desire him at his death to give to his son and his children, and to the children of his late daughter, as he shall think fit.” *Robert Mason* died in the life-time of the testator; after whose death, the children of *Robert* and his daughter, [the children of the son and the daughter] were held entitled to the 2000*l.* in equal shares (b). In *Harding v. Glyn*, *Nicholas Harding*, by his will, gave “to *Elizabeth* his wife, all his estate, leases, and in-

(a) 2 Vern. 466.

(b) Cited Amb. 4.

terest in his house in *Hatton Garden*; and all the goods, furniture, and chattels therein at the time of his death; and also all his plate, linen, jewels, and other wearing apparel; but did desire (a) her, at or before her death, to give such leases, house, furniture, goods, and chattels, plate, and jewels, unto and amongst such of his own relations, as she should think most deserving, and approve of."

The testator died without issue. *Elizabeth*, his widow, made her will, and by it gave all her estate, right, title, and interest in the house in *Hatton Garden*, to *Henry Swindell*; and after giving to *Caleb Harding* all her plate, and bequeathing several other legacies, gave the residue of her personal estate to the defendants, her executors. She soon after died without having, at or before her death, given any part of the property bequeathed to her, excepting the plate, amongst her husband's relations. A bill was filed, to have the property distributed amongst the husband's next of kin. By the *Master of the Rolls*: "The first question is, if this is vested absolutely in the wife; and the second, if it is to be considered as undisposed of, after her death, who are entitled to it? As to the first, it is clear the wife was intended to take beneficially during her life only. There are no technical words required in a will; but the manifest intent of the testator is to take place, and the words "willing," or "devising," have been frequently construed to amount to a trust; *Earles v. England*, 2 Vern. 466; and the only doubt arises on the persons who are to take after the wife. Where the uncertainty is such, that it is impossible for the Court to determine what persons are meant, it is very strong [reasonable] for the Court to construe it only as a *recommendation* to the first devisee, and make it absolute as to him; but here the word "relations," is a legal description,

(a) See 2 Bro. C. C. 46.

and this is a devise to such relations, and operates as a trust in the wife, by way of power of naming and apportioning; and her non-performance of the power [trust] shall not make the devise void, but the power shall devolve on the Court; and although this is not to pass by virtue of the Statute of Distributions, yet that is a good rule for the Court to go by. And therefore I think it ought to be divided among such of the relations of the testator, *Nicholas Harding*, who were his next of kin at her [his wife's] death" (a). In *Brown v. Higgs*, it was said by the *Master of the Rolls*, that, in *Harding v. Glyn*, "the Court seems to have held, that under the word 'relations,' the widow of the testator might, if she thought fit, include persons not next of kin; but as to so much as she had not disposed of, it would go to such persons as were next of kin according to the Statute of Distributions" (b). In *Clifton v. Lombe*, in the will of Sir *Thomas Lombe* were the words, "In consideration that Lady *Lombe* has promised to give what I shall give her, to her and my children, at her death, I give her," &c. These words were held to create a trust for the children (c). In *Massey v. Sherman*, a devise of copyholds to testator's wife in fee, "not doubting but that my wife will dispose of the same to and amongst my children, as she shall please," was held to create a trust for the children as the wife should appoint (d). In the *Earl of Bute v. Stuart*, a testator devised certain estates and collieries to trustees, upon trust to convey and dispose of the same in such manner as the Countess of *Bute*, his daughter, should direct or appoint. This devise the testator explained by a further clause in the will, which declared that, although his meaning was to give his daughter the

(a) 1 Atk. 469. See 5 Ves. 501. (c) Amb. 519.
 8 Ves. 571. (d) *Ibid*, 520.
 (b) 5 Ves. 502.

absolute disposal of the collieries, &c., to prevent the expenses and trouble that must attend the management of affairs of such a nature, under the direction of the court of Chancery, he requested his daughter to direct the money arising therefrom, to be applied in such manner as he had directed the same in default of her direction and appointment. The Countess of *Bute* appointed to her husband in fee. On a bill by the Earl of *Bute* for a conveyance from the trustees, Lord *Northington* held the appointment void, and that the power given to Lady *Bute* was, by the explanatory clause, intended to be a power to *sell* the estate (a). If Lady *Bute* had sold the estate, it appears to have been considered, that the *request* of the testator to Lady *Bute* to direct the application of the purchase money amounted to a *desire*, and that she had no choice in directing the application of it (b). In *Nowlan v. Nelligan*, the father of the plaintiff made a will in the words, "I give and devise to my beloved wife, *Harriet Nowlan*, all my real and personal estate. I make no provision expressly for my dear daughter, knowing that it is my dear wife's happiness, as well as mine, to see her comfortably provided for; but in case of death happening to my said wife, in that case, I hereby request my friends *Staples* and *Hunter* to take care of, and manage to the best advantage for my lovely daughter *Harriet Nowlan*, all and whatsoever I may die possessed of." The executors got in the personal estate of the testator, and with it purchased 11,000*l.* 4 per cent. annuities. The mother afterwards married the defendant, *Nelligan*, and, by a settlement previous to the marriage, 5000*l.* part of the 11,000*l.* were settled to the use of the daughter at 21, or marriage, and the remaining 6000*l.* on the mother and her intended husband, and the children of the marriage. It was decreed, that under the will, the wife was entitled

(a) 2 Eden. 87.

(b) *Ibid*, 104, 106.

to the 11,000*l.* for her life, subject to a maintenance for the daughter, and that the daughter was entitled to the whole fund at her mother's death (a). In *Pierson v. Garnet*, a testator bequeathed personal property to *Peter Pierson*, his executors, administrators, and assigns; and added, "and it is my dying request to the said *Peter Pierson*, if he shall die without leaving issue living at his death, that the said *Peter Pierson* do dispose of what fortune he shall receive under this my will, to and among the descendants of my late aunt, *Anne Coppinger*, his grandmother, in such manner and proportion as he shall think proper." It was decreed by the *Master of the Rolls*, that the words in this will were imperative, and created a trust in favour of the descendants of *Anne Coppinger* (b). And, on appeal, the decree was affirmed by Lord *Thurlow*. "In this case," said his Lordship, "the devisee takes only an estate for life in the produce of the fund: the intention of the testator was, that if he had children, he should take an absolute power of disposal; if not, it should go to the descendants of his aunt. If the word used had been *relations*, it would go to those within the Statute of Distribution; but, under these words, it will go only to such relations as are descendants, which is still more limited" (c).

The farther cases referred to in the margin (d) are to the same purpose. In each, the particular words in the will were held to create a trust (e).

(a) 1 Bro. C. C. 489.

(b) 2 Bro. C. C. 38.

(c) *Ibid*, 230.

(d) *Brown v. Higgs*, 4 Ves. 708.
5 Ves. 495. 8 Ves. 561. *Cruwys*
v. Colman, 9 Ves. 319. *Taylor v.*
George, 2 Ves. & B. 378. *Birch*
v. Wade, 3 Ves. & B. 198. Pre-

vost *v. Clarke*, 2 Madd. Rep. 458.
Forbes v. Ball, 3 Mer. 437. *Pope*
v. Whitcombe, *ibid*, 689. *Hor-*
wood v. West, 1 Sim. & St. 387.

(e) See also *Godolphin v. Go-*
dolphin, 1 Ves. 21. *Vernon v.*
Vernon, Amb. 3. *Cloudesly v.*
Pelham, cited *ibid*, 5. 1 Vern. 411.

IN the following case, a trust to devise has been held not to be created in the devisee; the parties to be the devisees over being too indefinitely named.—

In *Harland v. Trigg*, *Philip Harland* devised in the words, “And all other my leasehold estates in the parish or township of *Sutton* I give to my brother, *John Harland*, for ever, hoping he will continue them in the family.” By Lord *Thurlow*: “I have no doubt, but a requisition made with a clear object will amount to a trust. In the case of the Duchess of *Buckingham*’s will, the words were very gentle, but had a distinct object; but where the words are not clear as to their *object*, they cannot raise a trust I had a doubt, whether the family could not claim some interest in the subject; but when I come to consider, I take the rule of law to be this; that two things must concur to constitute these devises—the terms and the object. ‘Hoping’ is in contradistinction to a direct devise; but, whenever there are annexed to such words, precise and direct objects, the law has connected the whole together, and held the words sufficient to raise a trust; but then the objects must be distinct: where there is a choice, it must be in the power of the devisee to dispose of it either way. If he had sold these leaseholds, the family could not have taken them from the vendee; or, if he had given them to any one part of the family, the others could have no remedy, The will does not import a devise, as the words do not clearly demonstrate an *object*” (a).

IN the cases which follow, a trust to devise has been held not to be created in the devisee, he not been unauthorised to dispose of the property in his life-time.—

(a) 1 Bro. C. C. 142.

In *Palmer v. Schribb* a person devised the residue of his estate to his wife, and desired her to give all her estate at her death, to his and her relations. The Lord Chancellor *Harcourt* thought these words "too general to amount to a devise over of the testator's estate after the death of the wife; nor can it be taken as a trust, because the words extend [only] to all the estate which she shall be possessed of at the time of her death, which the husband has not any power over; and, therefore, it must be taken as a recommendation, and not as a devise or trust. But if the testator had desired his wife, by his will, to give at her death all the estate, which he had devised to her, to his and her relations; there the estate devised to her ought to go, after her death, to his and her relations, according to the Statute of Distributions" (a). In *Bland v. Bland*, a testatrix devised all her real and personal estate to Sir *John Bland*, his heirs, executors, administrators, and assigns, chargeable with the payment of all her husband's debts, and her own, and also with the farther sums of 4000*l.* and 2000*l.* The will then says, "and it is my earnest request to my son, Sir *John Bland*, that, on failure of issue of his body, he will sometime in his life-time, either by will, or any other writing, settle the said premises, or so much thereof as he shall stand seised of at the time of his decease, so and in such manner as that, on failure of issue of his body, the same may come to my daughter, Mrs. *Jacob*, and the heirs of her body," &c. It appears a trust was held not to be created in Sir *John Bland* under this will, principally from the words "or so much thereof as he shall stand seised of at the time of his decease." "There is no request," said Lord *Hardwicke*, "to settle the whole

(a) 2 Eq. Cas. Abr. 291, pl. 9. See also *ibid.* pl. 8, apparently S. C.

lands, or any particular part ; but a power is left in him to dispose of, sell, or give away the whole estate in his life, and only 'so much as he should stand seised of at his death' she requests he would settle. It is as much as if she had said, 'I leave it to you to dispose of as you think fit, but I shall be glad if you will give as much as you can spare, so and so.' Sir John might have sold this, or settled it for the advancement of a son or daughter." His Lordship added, "I do not lay it down, that in a will a request may not amount to a legacy, but it should be limited to some *certain* thing, or for some *certain* part of a thing, and not left absolutely to the pleasure of the person to whom the request is made" (a). In *Wynne v. Hawkins*, a person by his will, after giving some pecuniary legacies, proceeded, "Not doubting but that she [testator's wife] will dispose of what shall be left at her death to our two grandchildren, all the rest and residue of my personal estate I give and bequeath to my loving wife *Mary*." By Lord *Thurlow*: "If a bill had been filed in the life-time of the wife, could I have ordered this money to be laid out, and that she should receive the interest for her life, and then it should go over? These are equivocal words, the intent of which is to be gathered from the context. If the intention is clear, what was to be given, and to whom, I should think the words 'not doubting' would be strong enough. But where, in point of context, it is uncertain what property was to be given, and to whom, the words are not sufficient, because it is doubtful what is the confidence which the testator has reposed. Here he meant this fortune to pass through the pleasure of his wife, leaving it to her to use what she pleased, and consequently to make the residue such as she chose" (b).

(a) 2 Cox Rep. 349, 354, 356.

(b) 1 Bro. C. C. 179.

The cases referred to (a) are farther authorities to the same effect (b).

IN *Cunliffe v. Cunliffe*, a person devised certain "sugar-houses, stock in trade there, and the appurtenances thereto belonging, to his son, *Ellis Cunliffe*: nevertheless, in case his son, *Ellis*, should happen to depart this life without a son or sons born of his body in his life-time, or in due time after his death, then and in such case he *recommended* it to him to give and devise the said sugar-houses, and stock in trade there, to his brother *Robert*." On this will, the Lord Commissioners, *Smythe* and *Aston*, held the words used by the testator to amount to a mere *recommendation*. A trust, in consequence, was not created in the devisee (c).

SECTION XXV.

Of Executory Devises.

THE chief object of a settlement of real property on several persons is, to entitle them, in succession, to the enjoyment of the land for years, for life, in tail, or in fee. And the two chief cares of the law on a settlement of real property are, to prevent a vacancy in the possession of the freehold, and the creation of a perpetuity. The technical

(a) *Le Maitre v. Bannister*, cited 2 Bro. C. C. 40, 46. *Sprange v. Barnard*, 2 Bro. C. C. 585. *Eade v. Eade*, 5 Madd. 118. *Curtis v. Rippon*, *ibid*, 434.

(b) See also *Countess of Bridgewater v. Duke of Bolton*, 1 Salk. 236. *Attorney General v. Hall*,

cited 2 Cox Rep. 355. *Dolton v. Hewen*, 6 Madd. 9.—*Bull v. Vardy*, 1 Ves. jun. 270, is a case of a *power* to bequeath.

(c) *Amb. 686*. See 2 Bro. C. C. 46; also *Le Maitre v. Bannister*, cited *ibid*, 40, 46.

forms of particular estate and remainder, which are found in a common law deed, are not required in a settlement by will; and, in their place, the informal limitations, called executory devises, are permitted to have the effect of technical limitations. Irregularity of form in a will is, nevertheless, not permitted either to put the freehold in abeyance, or to create a perpetuity. In the exposition, therefore, of executory devises; subserviently to the rules against the abeyance of the freehold, and the creation of a perpetuity, the aim of the law is, to fulfil the intention of the testator; and, moreover, it should seem, to give to the irregular limitations of the will the *effect* of a settlement in form by deed. If *A.*, seised in fee, devises on a contingency, within the legal perpetuity, to *B.* in fee; until the contingency happens, the freehold in possession, being undisposed of, descends to the testator's heir at law (*a*). The descent prevents the abeyance of the freehold; and, in effect, a particular estate, with a limitation over, are created by the will; namely, to the heir at law until the contingency happens; and, on the contingency, to *B.*, and his heirs. So, if *A.*, seised in fee, devises to *B.* and his heirs, until *C.* shall attain 21, and if *C.* should live to that age, or have issue, then to *C.* in tail; but if *C.* should happen to die before the age of 21, or without issue, to *D.* in tail; until *C.* has issue, or attains 21, *B.* is the tenant of the freehold; and as soon as *C.* has issue, or attains 21, *C.* becomes tenant in tail, remainder to *D.* in tail. The limitations in the latter supposed case are the executory devises in the will in *Brownsword v. Edwards* (*b*), a direct point of which case, it may be added, is, that in the words, "but if *C.* should

(*a*) *Pay's Case*, Cro. Eliz. 878. *ward v. Stillingfleet*, 1 Atk. 422.
Gore v. Gore, 2 P. W. 28. Hay- (*b*) 2 Ves. 243.

happen to die before the age of 21, *and* without issue;" to fulfil the intention of the testator, the word '*and*' was construed *or*. An incidental point in the same case is, that although a limitation on an executory devise is necessarily itself an executory devise(*a*); yet, notwithstanding it may be uncertain if the contingent interest under the first executory devise will ever become an estate, there may still be a certainty that the interest under the second executory devise will become one. It was uncertain if *C.* would ever reach 21, or have issue; but it was certain that the interest of *D.* would become an estate-tail. Until *C.* attained 21, or had issue, the devise to *C.* was executory, and the devise also to *D.* Had *C.* had issue, immediately *C.* would have had an estate-tail, and *D.* a *remainder*, an estate-tail in remainder. So also when, as was the case, *C.* attained 21, *C.* had an estate-tail, and *D.* a vested remainder in tail.

In the case also where, by the lapse of a particular estate, a limitation in remainder is necessarily at the death of the testator construed to be an executory devise, the freehold in possession will descend to the heir at law of the testator, until the interest under the executory devise becomes an estate(*b*).

It further appears, that, on an executory devise of lands of inheritance, the heir at law of the testator is entitled to the intermediate rents and profits of the land(*c*); unless, by the executory devise, the interim rents and profits

(*a*) *Gore v. Gore*, 2 P. W. 28.

(*b*) *Hopkins v. Hopkins*, Cas. temp. Talb. 44.

(*c*) *Hopkins v. Hopkins*, Cas.

temp. Talb. 44. *Bland v. Bland*,

2 Cox. 349. *Bullock v. Stones*,

2 Ves. 521. See also *Chambers*

v. Brailsford, 18 Ves. 368.

are to accumulate, and, with the land, are also devised to the devisee (a); or, unless by a residuary (b) clause they are devised; or, in some other way (c) are disposed of in the will.

The heir at law has been held entitled to the interim rents in the cases which follow:—

In *Hopkins v. Hopkins*, a testator devised his real estate to trustees, and their heirs, to the use of them and their heirs, in trust for *Samuel Hopkins*, son of *John Hopkins*, for life; and, from and after his decease, in trust for the first and every other son of the body of the said *Samuel*, and the heirs male of the body of every such son; and, for want of such issue, in case the said *John Hopkins* should have any other son or sons of his body, then in trust for all and every such son and sons, respectively and successively, for their lives, with remainders over; the ultimate trust for the testator's own right heirs for ever. The will farther contained a proviso, which postponed the full enjoyment of the rents and profits of the estate by the sons of *John Hopkins* until they attained 21. *Samuel Hopkins* died in the testator's life-time without issue. At the time of the death of the testator, *John Hopkins* had no other son. It was first determined, that the limitation to the other sons of *John Hopkins* might operate as an executory devise. "The next question," said the Lord Chancellor *Talbot*, "is, what is to become of the rents and profits, in case this be taken to be an executory devise, until the birth

(a) *Chapman v. Blisset*, Cas. temp. Talb. 145. *Gibson v. Lord Montfort*, 1 Ves. 485. *Gibson v. Rogers*, Amb. 93. *S. C.* *Glanvill v. Glanvill*, 2 Mer. 38. *Genery v. Fitzgerald*, Jacob Rep. 468.

(b) *Stephens v. Stephens*, Cas. temp. Talb. 228. *Gale v. Gale*, 2 Cox, 136. *Duke of Bridgewater v. Egerton*, 2 Ves. 122.

(c) *Bullock v. Stones*, 2 Ves. 521.

of a son to *John Hopkins*? And this must depend upon the wording of the proviso; by which words none are affected but such as are come to the estate under the limitations. It restrains them from having any thing to do with the estate until they attain the age of 21, and provides the surplus, beyond their allowance, to be laid up for them; but here is no provision made what shall become of those rents and profits until a son be born. But, until somebody is *in esse* to take under this executory devise, the rents and profits must be looked upon as a residue undisposed of, and consequently must descend upon the heir at law; the case being the same, where the whole legal estate is given to the trustees, and but part of the trust disposed of, as in this case; and where but part of the legal estate is given away, and so, the residue undisposed of, the legal estate descends upon the heir at law" (a).

In *Bland v. Bland*, Sir *John Bland* devised to his wife for a term of 14 years, to commence from his decease, in trust to raise annuities for his younger children, and to pay all his debts, legacies, and funeral expenses. He then declared his will to be, that as soon as such annuities and his debts and legacies and funeral expenses should be paid, the said term of fourteen years should cease; "and he gave the lands comprised in the said term, from and after the expiration of that trust, to certain trustees, until the defendant, Sir *John Bland* [the eldest son of the testator] had a son of the age of 21 years; to whom they should deliver up the possession of all his real estate comprised in the said term, with all the arrears and profits that should have accrued before that time; with this proviso, however, that he should entail all those real estates on some or one of his brothers (if he should have

(a) Cas. temp. Talb. 44.

no son who should arrive at the age of 21 years), who should come next to the title of baronet." He then declared, that neither his real nor personal estate should be put in the power of his son *John*, but be preserved for the use of his eldest and other sons in tail male, and after them to the use of his (the testator's) son, *Hungerford*, and his first and other sons in like manner. By Lord *Hardwicke*: "As to the devise to trustees after the determination or cesser of the estate of fourteen years to the lady *Bland*, that must be looked upon as a devise in fee, because the trust cannot be performed without it. As to the rents and profits that are to accrue until Sir *John Bland* has a son aged 21, I am of opinion these will belong to Sir *John Bland*, the defendant. This case very little differs from that of *Hopkins v. Hopkins* (*Forr.* 44), where there was a proviso, that none of the persons, to whom the estates for life were limited, should be in possession thereof until their ages of 21, and then to go to such persons as should first be entitled; there were none of the remainder-men *in esse*, and no proviso what was to become of the rents until a son was born, and therefore they were looked upon as a residue undisposed of, and went to the heir at law. A man cannot say negatively, my heir at law shall not have my estate, but he must make a complete disposition of it to somebody else." His Lordship declared, "that Sir *John Bland*, as heir at law of his father, was entitled to the surplus of the rents and profits of the trust estate as should accrue during the continuance of the term of fourteen years; and also to such surplus rents and profits as should accrue from the determination or cesser of the said term, until he should have a son born, as being undisposed of by the will of Sir *John Bland*, the father (a)."

In the cases which follow, the interim rents and profits have been held to be intended to accumulate, and, with the land, to be devised to the devisee of the executory devise.—

In *Gibson v. Lord Montfort*, a person devised all and singular his freehold, leasehold, copyhold, and also personal estate of what kind soever, to trustees, their executors, administrators, and assigns; in trust to pay several annuities, sums, and legacies, by and out of the produce of the personal estate: if that should happen to be deficient, then to pay the same by and out of the rents, issues, and profits arising by the real estate: and as for and concerning all the rest, residue, and remainder of the real and personal estate, of what nature and kind soever, after provision being made for the payment of the legacies, &c., he gave the same to such child or children, as his daughter should have lawfully begotten, whether male or female, equally to be divided between them; if his daughter should die without such issue of her body, then he devised the same to two other persons, equally to be divided between them, share and share alike. On this will, it became a question, with respect to the surplus rents and profits of the real estate, after satisfaction of the particular charges on it created by the will, until such time as the person to whom the testator devised on contingency, namely, a child of the daughter, came *in esse*; whether they were to go either as part of the residue [the estate devised], to attend the several limitations of that residue [estate], or to the testator's heir at law. Lord *Hardwicke* first determined, that the trustees took under the will the legal estate in fee; and, secondly, that the surplus rents, until the contingency of the executory trust took place, were devised away from the heir. "It is admitted," said his Lordship, "that the testator might, by express words,

have given the surplus rents and profits that should accrue, before the daughter had a child, or died without issue, away, either to such child when born, or to the person to take when she died without issue. The question then is, whether by express words, or plain necessary implication, they are given away from the heir at law; and I am of opinion that, by plain necessary construction, they are. It is pretty hard to say, that, in any case, where one devises all the rest and residue of his real estate, the heir should be enabled to claim any thing out of it; and how can he claim or take these intermediate profits? He must claim them as part of the real estate undisposed of. As to the surplus interest and profits of the personal estate, they are admitted to pass; and both real and personal being comprised in the same clause is a strong argument against a resulting trust to the heir at law. On the whole, I am of opinion that these surplus rents must be received by the trustees, accumulated, and laid up" (a). In *Glanvill v. Glanvill*, a testator, after making a provision for the maintenance of his son *Thomas William*, and of his daughter *Emily*, gave the residue of his property in the following words: "And as to all the rest, residue, and remainder of my estate and effects, as well real as personal, or of what other nature or kind soever, I give and devise the same unto and to the use of my son *Thomas William Glanvill*, according to the nature of the same estates respectively, and to be a vested interest upon his attaining the age of 21; provided, that in case my said son shall happen to die before attaining the said age of 21, then all the rest and residue of my said real and personal estate, so given and devised unto him, shall go and belong to my daughter *Emily Glanvill*." On this devise, the rents and profits of the real estate were decreed to be accumulated until the devisee, *Thomas William*

(a) 1 Ves. 485. Amb. 93.

Glanvill (who was also the testator's heir at law), should attain 21; or, until his death, which should first happen (a). In *Genery v. Fitzgerald*, a testator, after subjecting his real and personal estate to the payment of his debts, legacies, and annuities, and making provision for the maintenance of his reputed children, *Edward, Thomas, and William Fitzgerald*, during their minorities, proceeded thus: "All the rest, residue, and remainder of my estate, real, personal, or mixed, or of what nature or kind soever the same may be or consist, and wheresoever situate, subject as aforesaid, I give, devise, and bequeath the same, and every part thereof, unto the eldest of my said three reputed children, who shall attain the age of 21, his heirs, executors, administrators and assigns for ever." The testator was seised of some real estates in the island of *Jamaica* (subject to a mortgage), with the slaves, the cattle, and other stock upon them. The defendant, *Thomas Fitzgerald*, the brother and heir at law of the testator, claimed to be entitled to these premises, and to the rents and profits, subject to the mortgage, until one of the infant sons of the testator should attain the age of 21. A decree pronounced at the Rolls declared, that the defendant, *Thomas Fitzgerald*, was not entitled to the rents and profits during the minority of the infants; and, on appeal, Lord *Eldon* affirmed the decree. "I think," said his Lordship, "this decree is right. The general principles are these: When personal estate is given to A. at 21, that will carry the intermediate interest. If a testator gives his estate, *Blackacre*, at a future period, that will not carry the intermediate rents and profits. But when he mixes up real and personal estate in the same clause, the question must be, whether he does not shew an intention, that the same rule shall operate on both. Here the property was partly real, partly personal, and partly of such a description that

(a) 2 Mer. 38.

the testator does not seem to have known whether it was real or personal. He does not by his will create any trust, but makes a legal devise and bequest of the whole together. Then, is not the weight of authority in favour of the proposition, that when real and personal estate are given in this way, the intermediate profits of both must go together? I think it is, and the decree must, therefore, be affirmed (a)."

In the following cases, intermediate rents of an estate, devised by an executory devise, have been held to pass under a residuary clause in the will.—

In *Stephens v. Stephens*, a testator devised to his grandson, *William Stephens*, his heirs and assigns; and added, "but in case my said grandson, *William Stephens*, shall happen to die before he attains his age of 21 years, then I give and bequeath to my grandson, *Thomas Stephens*, all, &c.; to hold to him, his heirs and assigns for ever. But in case my said grandson, *Thomas Stephens*, shall happen to die before he attains his age of 21 years, then I give and bequeath all, &c., to such other son of the body of my daughter, *Mary Stephens*, by my son-in-law, *Thomas Stephens*, as shall happen to attain his age of 21 years, his heirs and assigns for ever:" and further added the residuary clause, "all the rest and residue of my estate, real and personal, whatsoever and wheresoever, not hereby before bequeathed, I give and bequeath to my said son, *Thomas Stephens*, his heirs, executors, administrators and assigns, for ever." The two grandsons, *William* and *Thomas Stephens*, died after the testator, and under the age of 21. It was first determined, that the limitation on the devise to *Thomas Stephens*, the grandson, was a good executory devise. With respect to the intermediate rents and profits of the land, the certificate of the court of

(a) Jacob Rep. 468.

King's Bench, to whom the case had been referred, states, "As to the profits of the estate received since the death of *William*, the grandson, or to be received until it shall vest in any one person by force of the said executory devise, or shall go over to the remainder-man, we conceive that they belong to Sir *Thomas Stephens*, by virtue of the residuary devise in the will, as an interest in the testator's real estate, not before bequeathed or disposed of by his will." The Lord Chancellor *Talbot* decreed accordingly (a). In *Gale v. Gale*, *Joan Proctor* being seised in fee of customary lands in two separate manors, surrendered them (according to the customs) into the hands of the lord of each, to the use of her nephew *Henry Proctor Gale*, and his heirs, in trust to perform her will. She afterwards devised to her nephew, *Henry Proctor Gale*, and his assigns, for and during the term of his natural life; and from and after his decease, to the eldest son of her said nephew, that should live to attain the age of 21 years, his heirs and assigns for ever; and in case the said *Henry Proctor Gale* should happen to die without any issue male, that should live to attain the age of 21 years; then she devised the same premises to *Ann Gale* (sister of her said nephew), and to *Hannah* and *Ann Gale* (daughters of *Roger Gale*), and to their heirs for ever. And after giving several specific and pecuniary legacies, the testatrix gave all the rest and residue of her goods, chattels, estates, and effects, to her said nephew *Henry Proctor Gale*, *Ann Gale*, his sister, and *Hannah* and *Ann Gale*. *Henry Proctor Gale* died after the testatrix, leaving *Henry Proctor Gale*, his eldest son, an infant under the age of 21 years, but who afterwards attained 21. On a bill filed in the court of Exchequer, on the title to the intermediate rents and profits between the death of *Henry Proctor Gale*, and his son's

(a) Cas. temp. Talb. 228. See 1 Ves. 491.

attaining the age of 21, it was said by the Lord Chief Baron (who delivered the judgment of the Court); "This estate, which supports the contingent remainders, being in the trustees merely as channels and instruments of conveyance, the trust of the intermediate rents and profits, which accrued between the death of the tenant for life, and the time when some other person became entitled under the limitations of the will, must result somewhere, and, unless disposed of by the will, must go to the heir at law. In this case, there is a general sweeping residuary clause, giving all the testator's goods, chattels, estates, and effects, to *Henry Proctor Gale, Ann Gale*, the sister, and *Hannah and Ann Gale*. One can scarcely imagine that the testatrix had this event in contemplation, or could mean to include these intermediate rents and profits in the residuary bequest, because they could not arise until after the death of *Henry Proctor Gale*, one of the residuary legatees; but still if she has used such large words in the will, as will comprehend these rents and profits, this interest must pass with the residue. On the whole of the case, therefore, I think the intermediate rents and profits passed by the residuary clause (a)."

IF a termor for years devises his term on a contingency, it appears that the rents and profits of the land, from the death of the testator, belong to, and are to be accumulated for the benefit of, the person who, under the contingent limitation, first acquires an estate in the land; unless, by the will, they are, in the meantime, otherwise disposed of (b).

(a) 2 Cox. Rep. 136.

Atk. 473. *Atkinson v. Turner*,

(b) *Bullock v. Stones*, 2 Ves.

ibid, 41. *Butler v. Butler*, 3 Atk.

521. *Studholme v. Hodgson*, 3

58. *Trevanion v. Vivian*, 2 Ves.

P. W. 300. *Green v. Ekins*, 2

430. See also *Jacob Rep.* 470.

In *Bullock v. Stones*, a testator devised in the words: "I do leave all my real and personal estate at *Ashgate*, in trust to *A.*, *B.*, and *C.*; my desire is, that all my debts and funeral charges be paid, and such legacies as I shall after mention." Then, after certain directions and legacies, he added, "My will and desire is, that the first son of *John Stones*, when he comes to 21, shall have all my estate, real and personal, at *Ashgate*." By Lord *Hardwicke*:—"The personal estate passes by this will to the trustees, first, for payment of debts; but the whole surplus of that will belong to the son of *John Stones*, when that son attains 21; which is a reasonable compass of time for such a bequest to take place; and, until then, the profits of that personal estate will accumulate" (a). In *Studholme v. Hodgson*, a person, by his will, gave several leasehold houses in *St. James's*, to *Mary Procter*, for her life, remainder to *Michael Hodgson*, son of *Cuthbert* and *Mary Hodgson*, if he lived to 21; otherwise to such other children as the said *Mary Hodgson* should have, equally; and, for want of such children, then to the said *Mary*, his mother, her executors, and administrators. And the testator gave all the rest of his personal estate to the said *Michael Hodgson*, his executors, administrators and assigns. Afterwards by a codicil, reciting the bequests of the houses and the residue, the testator declared, that in case *Michael Hodgson* should die before 21, and the said *Mary*, his mother, should die without any other children or child by the said *Cuthbert Hodgson*, then all the legacies and bequests of the said houses and premises should go, descend, and come to the testator's nephew, *William Studholme*, his heirs and assigns for ever. The infant son, *Michael Hodgson*, died within a few days before his age of 21. *Mary Hodgson* having no other child, *William Studholme*, the

(a) 2 Ves. 521.

devisee over, brought his bill for an account of the testator's personal estate, and to have the same secured and set apart, to the end that, in case the contingency of the death of *Mary Hodgson* without children should happen, he might receive the same; and that, in the meantime, the money arising from the rents and profits might be placed out on securities, in order to wait the event of the contingency. It was decreed, "The profits of the residue from the death of *Michael* [the rents of the houses from the death of *Mary Procter*, the tenant for life], till the contingency happens, are to accumulate and be added to the capital; and, if no child of the defendant, *Mary*, by her husband *Cuthbert*, then to go to the plaintiff"(a). In *Green v. Ekins*, a testator devised all the residue of his personal estate to any son he should have by his wife at his age of 21; and, if no son, then to his daughter *Frances*, to be paid to her at her age of 21, or marriage; but if it should happen, that his daughter *Frances*, should depart this life before 21, or marriage, and he should have no other daughter born of his wife, who should attain 21, or marry; then, and in such case, if his daughter, *Elizabeth Burnaby*, should have issue of her body one or more son or sons, he gave and bequeathed the residue of his personal estate to such son of his said daughter as should first attain the age of 21. The testator died soon after making the will, and, within half a year after his death, *Frances*, his daughter, died an infant; and the plaintiff being entitled, when of age, to the estate bequeathed, it became a question, whether the interest of the personal estate, from the death of *Frances*, the daughter, to the time it would vest in the plaintiff, or any other son of Mrs. *Burnaby*, must be accumulated, and wait on the contingency; or whether it was an interest undisposed of, and

(a) 3 P. W. 300.

went to the next of kin of the testator. By Lord *Hardwicke*: "During the life of *Frances*, the daughter, the profits vested in her, because the residue did so; as it was a legacy payable at a future time, and divested on the contingency. As to the rest of the profits which have accrued and will accrue till the devise to the son of Mrs. *Burnaby* vests, I am of opinion, that the interest and profits must be considered as a part of the residue, and must accumulate. The case of *Studholme v. Hodgson* is in point. I do accordingly decree the profits to accumulate" (a).

SECTION XXVI.

Of a Devise to Uses.

IT cannot, it is apprehended, at the present day be doubted, that the Statute of Uses, 27 Hen. VIII., c. 10, does, and was intended by the legislature to, operate on limitations to uses in a will (b). There is reason perhaps to be surprised, that the point was ever considered to be questionable. The Statute of Wills, 32 Hen. VIII., c. 1, did not originate devises, but simply extended the right to devise, which right has been farther extended by the statute 12 Car. II., c. 24, which abolished tenure by knight-service. That the Statute of Uses operates on uses in a will appears conclusive from the circumstances, that, by particular custom, it was legal to devise before the Statute of Wills; that the preamble of the Statute of Uses, in enumerating the usual conveyances to uses, mentions, by name, conveyances by *will*; and that the enacting part of the same statute includes, also by name, a seisin to uses *by reason of a will*.

(a) 2 Atk. 473.

134—139. Sugd. Gift. Uses, 3rd

(b) See Sugd. Powers, 3rd edit. edit. 356, note 2.

On a conveyance, by deed or will, to uses, the design and effect of the Statute of Uses are, immediately on the conveyance, to take from the trustee the seisin conveyed to him. The statute operates, if at all, immediately; and when it does, the estate of the trustee passes to and from him in the same instant. In indulgence to testators, the effect of the statute on a will depends on the intention of the person who makes it. A will is construed not to be affected by the statute, if the seisin conveyed is intended, for any purpose of trust, to remain in the devisee (*a*). The seisin of a devisee in fee is, in particular, construed to be intended to remain in him, when the words of the devise import that the devisee is himself to receive the rents and profits of the estate, and to pay them over to a married woman (*b*), or other (*c*) person, for life. In these cases the *cestuis que use* are, in consequence, held to take an equitable estate only under the will. But it appears, if the words of the devise import simply that the *cestui que use*, a married woman or other person, is to be permitted to receive and take the rents and profits of the estate, the devise is construed not to create a trust; and the will being then left to the ordinary effect of the Statute of Uses, the *cestui que use* is, in consequence, held to take a legal estate under the will (*d*).

It not being legal to devise a fee on a fee (*e*); if, on a devise to *A.* in fee, the Statute of Uses does not affect the devise,

(*a*) Gregory v. Henderson, 4 Taunt. 772.

(*b*) Nevil v. Saunders, 1 Vern. 415. Harton v. Harton, 7 T. R. 652. Gregory v. Henderson, 4 Taunt. 772. Tenny v. Moody, 3 Bingh. 3. See also South v. Al-
leyne, 5 Mod. 101, 1 Salk. 228.

(*c*) Silvester v. Wilson, 2 T. R. 444. Cooper v. Wyatt, 5 Madd. 482.

(*d*) Broughton v. Langley, 2 Ld. Raym. 873. Doe. ex dem. Leicester v. Biggs, 2 Taunt. 109.

(*e*) Tilbury v. Barbut, 3 Atk. 617.

it follows that, *A.* retaining the legal estate in fee, if there is a farther devise to *B.*, the interest of *B.* cannot, during the continuance of the estate in fee of *A.*, be a legal estate (*a*); and, also, that *B.* cannot be entitled to a legal estate devised to him, excepting by way of executory devise. But if a person, seised in fee, devises to *A.*, in trust; with a farther devise to *B.*; if, on the intention, the estate of *A.* is a *chattel* estate only, *B.* may take a legal estate in remainder under the devise (*b*). It may here also be observed, that a limitation to a person and his heirs does not invariably in a will convey a fee-simple: it is frequently, on the intention, construed to convey an estate *pur autre vie* only; in which case, a limitation over may convey a legal estate (*c*).

(*a*) *Bagshaw v. Spencer*, 2 Atk. 570; 1 Ves. 142. *Wright v. Pearson*, Amb. 358; 1 Eden, 119.

(*b*) *Cordal's case*, Cro. Eliz. 316. *Warter v. Hutchinson*, 1 Barn. & C. 721.

(*c*) *Jones v. Lord Say & Seal*, 1 Eq. Abr. 383. (See 2 Atk. 578;

7 T. R. 654; 3 Bos. & P. 179).
Shapland v. Smith, 1 Bro. C. C. 75.
Doe v. Simpson, 5 East, 162.
Doe v. Barthrop, 5 Taunt. 382.
Hawker v. Hawker, 3 Barn. & A. 537.
Biscoe v. Perkins, 1 Ves. & B. 485.

CHAPTER XVI.

OF DISINHERITING AN HEIR AT LAW.

A TITLE by descent is an older branch of the law of real property, than the right to devise. Lands held in fee descended, before, by particular custom, the tenant acquired the right to alien by will. By the Statute of Wills, all tenants in fee are authorised to devise in fee-simple; but, by the common law, the lands descend if they are not devised. The meaning, therefore, of the repeated proposition, that "an heir at law is not to be disinherited except by express words, or necessary implication (a)," seems to be, that the title of an heir at law cannot be supplanted by will, unless the lands are devised, by express words or necessary implication, to another person. If an heir at law is expressly, in the strongest language, disinherited; or, by a trifling bequest, is, on the vulgar notion, cut off with a shilling, and so is impliedly disinherited; still it is not enough, unless there is in the will a devise to supplant the title by descent. It is not an intention to disinherit the heir, but a devise away from him, that can disinherit him (b). In *Denn v. Gaskin*, a person devised in the words: "As to all such worldly estate as God has endued me with, I give and bequeath as follows: I give, bequeath, and devise all that my freehold messuage and tenement, lying in *Gaitsgill*, in the parish of *Dalston*, to *Matthew Robinson*, *George Robinson*, and *Thomas Robinson*, equally to them my sister's sons." The testator then, after bequeathing several small pecuniary legacies to most of his

(a) Willes, 140. 3 East, 521.
3 Dow 210.

(b) Cas. temp. Talb. 52, 2 C. x,
R. 358.

relations, gave to *John Gaskin*, his heir at law, ten shillings. All the rest of his goods, chattels, and personal estate whatsoever, he gave to the devisees mentioned. On this will it was held, that the devisees took only an estate for life in the real property. "It is settled in devises," said Lord *Mansfield*, "as well as in deeds, that if no words of limitation are added, the devisee can only take an estate for life. But as there are no technical words necessary in a will, if the testator makes use of what is tantamount; as if he says, "I give to such a one in fee simple," or "all my estate;" that will carry all his interest in the land devised. But there must be words in the will, to control the rule of law, which, I believe, in a variety of cases, thwarts the intention of the testator. I suspect extremely, that in this very case, the testator meant to give his nephews a fee in the premises in question; for he had no other landed property. He makes them residuary legatees of his personalty, and gives a disinheriting legacy to his heir at law, agreeable to the vulgar notion, taken from the *Roman* law, that an heir is cut off with a shilling; because, by the *Roman* law, a will that passed by the heir was called *inofficiosum testamentum*." His Lordship, after Mr. Justice *Aston* had expressed his opinion, farther said, "although the intention is ever so apparent, the heir at law must of course inherit, unless the estate is given to somebody else (a)."

It appears, then, an heir at law cannot be disinherited, unless the estate is devised away from him to a devisee, either expressly or by implication;—it is often said, by necessary implication. There are many observations to be found on the expression "necessary implication (b)." They were originally the words of the Chief Justice *Vaughan*,

(a) Cowp. 657.

Bro. C. C. 534. 1 Mer. 219.

(b) Willes, 140, 309, 372. 4

in *Gardner v. Sheldon*, in which he stated: "In a will, estates are often given by implication. But I shall take this difference concerning estates that pass by implication, although it be by will. An estate given by implication of a will, if it be to the disinheriting of the heir at law, is not good, if such implication be only *constructive* and *possible*, but not a *necessary* implication. I mean by a *possible* implication, when it may be intended, that the testator did purpose, and had an intention to devise his land to A., but it may also be as reasonably intended, that he had no such purpose, or intention to devise it to A. But I call that a devise by *necessary* implication to A., when A. must have the thing devised, or none else can have it. And, therefore, if the implication be only *possible*, and not *necessary*, the testator's intent ought not to be construed to disinherit the heir, in thwarting the dispose which the law makes of the land, leaving it to descend, where the intention of the testator is not apparently, and not ambiguously, to the contrary. To this purpose is the case in 8 Car. 1 (a)." The case, which his Lordship cites, is *Spirit v. Bence*, in which it was held, "that the words in a will, which disinherit the heir at the common law, ought to have an apparent intent, and not to be ambiguous and doubtful (b)." In *Moone v. Heaseman*, the Lord Chief Justice Willes observed; "The rule is, as it is expressly laid down in the case of *Gardner v. Sheldon*, that an heir shall never be disinherited, except by express words, or such as have a necessary implication. But, if this rule were to be taken strictly, it would overturn a great many resolutions. I might mention a multitude of cases to this purpose. If a man devise an estate to another, paying his debts, or paying a certain sum in gross, the devisee takes a fee simple. And so it is expressly held in many cases. And the reason

(a) Vaugh. 262.

(b) Cro. Car. 369.

which is given for it is, that every devise must be taken to be intended by the deviser to be for the benefit of the devisee; whereas, if he be obliged to pay the debts of the deviser, or a certain sum in gross, if the devisee should happen to die before he can raise the money out of the profits of the estate, if he were only to take an estate for life, he would be damnified and not benefited by this devise. But if *Vaughan's* rule were to hold, there would be an end of this way of reasoning, and all those cases must be overturned. For although the expression of paying the debts, &c., makes it highly *probable* that it was the deviser's intention that the devisee should have an estate in fee, yet it was very far from being a *necessary* implication. For, in many of the cases, the money devised to be paid was not near the value of an estate for *life* in the premises; and therefore it was possible that the testator might intend that he should only have an estate for life, because he might sell that estate immediately, and then he would be sure to be a gainer by the bargain. But as this is a foreign and not a natural construction, it has been always rejected. However, these cases shew that my Lord *Vaughan's* rule is not right. But the rule is, that the intent of the testator ought to appear plainly in the will itself, otherwise the heir shall not be disinherited" (a). "The distinction," Lord *Thurlow* has said, "which Lord *Vaughan* takes, where the implication is *possible*, and not a *necessary* implication, is well founded, and furnishes a rule to which all judges ought to submit. It is certain, that where the rule of law is clear, and the intent of the man is ambiguous, the law must prevail. Taking the case of *Gardner* and *Sheldon* in the strongest view, it is very clear that Lord *Vaughan's* idea does not dive into a strict necessary implication, but such an intent, that nothing is

(a) Willes, 140.

left ambiguous and doubtful”(a). “The expression, ‘necessary implication’, Lord *Eldon* has observed, “is frequently applied to cases between a devisee and heir at law; and yet there is hardly a case decided against an heir at law, where the implication upon which it was so decided was of absolute necessity” (b). It is, perhaps, probable, that the “necessary implication” in the rule, that an heir is not to be disinherited except by express words, or necessary implication, means an implication, which, on the evidence of the testator’s intention, is, in consideration of law, necessary to fulfil that intention. It is apprehended the substance of the Chief Justice *Vaughan*’s words is, that an heir at law is not to be disinherited by *doubtful* words in a will; and that this alone was his meaning seems proved by the particular mention he makes of the words to the same effect, which are found in the judgment in *Spirit v. Bence*.

It is clear that an heir at law is not to be disinherited by words of *doubtful* intention in a will. *Bowman v. Milbanke* is a case to this purpose. A person seised of lands in *Newcastle upon Tyne* (where lands were devisable by parol by the custom), by a parol will devised in the words, “I give all to my mother, all to my mother.” It was argued for the plaintiff, that by the word “all,” it was uncertain whether the testator intended lands or goods; and for the defendant, that he who gives all excepts nothing; and cases were cited, where by a devise of all the testator’s estate, all his estate as well real as personal passed; and where a devise of all the testator’s livelihood extended to lands and goods. But it was said by the Court, that “all,” is altogether uncertain, and not sufficient to disinherit an heir; and judgment was given, that the lands did not pass by the will (c).

As an heir at law cannot be disinherited by doubtful words, and conjecture is inadmissible in the exposition

(a) 4 Bro. C. C. 534.

(b) Mer. 219.

(c) 1 Lev. 130.

of a will, it follows, that, whenever on a devise of lands of inheritance, the words of the will fail to discover the intention, the particular devise is void, and the lands descend to the testator's heir at law (*a*).

A distinction may here be noticed between a *legacy* and a *devise*. A legacy which lapses falls into the residue, and passes with it to the residuary legatee; a devise lapses in favour of the testator's heir at law, to whom the lands, which were devised, descend, and do not pass under a devise of the residue (*b*). It appears, also, that on a devise to *A.*, remainder to *B.*; if *A.* dies in the life-time of the testator, the lapse of this devise to *A.* is not permitted to prejudice the estate in remainder, and the remainder falls into possession immediately on the testator's death (*c*). Farther, if the devise to *B.* depends on a contingency, and *A.* dies in the testator's life-time; on the death of the testator before the contingency happens, the limitation to *B.* will be an executory devise, and the freehold estate in possession will descend to the heir at law of the testator, until the contingency in the limitation to *B.* takes place (*d*).

(*a*) *Bowman v. Milbanke*, 1 Lev. 130; 1 Keb. 719. *Mohun v. Mohun*, 1 Swanst. 201. *Mason v. Robinson*, 2 Sim. & St. 295.

(*b*) *Doe v. Underdown*, Willes, 293. *Wright v. Hall*, cited *ibid*, 299. *Urmston v. Pate*, in Chan. 1 Nov. 1794; Stated 4 Cruise Dig. 477. 8 Ves. 25. See also *Goodright v. Opie*, 8 Mod. 123;

1 Ves. 141, 322. *Jones v. Mitchell*, 1 Sim. & St. 290.

(*c*) *Brett v. Rigden*, Plowd. 341. *Hartopp's Case*, Cro. Eliz. 243. *Fuller v. Fuller*, *ibid*, 422. Perk. 566, 567, 568; 8 Mod. 126.

(*d*) *Hopkins v. Hopkins*, Cas. temp. Talb. 44. *Doe v. Roach*, 5 M. & S. 482.

CHAPTER XVII.

OF THE EXPOSITION OF A WILL WITH A CODICIL.

A CODICIL is a part of a will (*a*). It is, therefore, to be construed with it, and may, as a context, confirm, vary, or altogether change an intention in the will. In *Coward v. Marshal*, a person by his will devised his lands to *I.*, his youngest son, and his heirs; and afterwards married again; and by another will devised the same land to his wife for life, paying annually to *I.*, his youngest son, and to his heirs, a certain rent. On the question, whether the second will was a revocation of the first, *Anderson and Glanville*, Justices, held it to be no revocation, "but that both may stand, although they be by several writings; unless it be manifestly contrary to the first will, or that there be an express revocation therein; but they ought to stand together, if they may, as made by and in one and the same writing. And here the testator's intention appears, that he had not any purpose to alter it as to his son, but only to provide for his wife, whom he afterwards espoused; and by the appointing of the rent to his son, it appears that his intent was, that the reversion should be to his son." It is added in the report, the matter was afterwards ended by arbitrament (*b*). Lord *Hardwicke* has observed on this case, that the doubt in it arose on a second will; "for had it been a codicil, there would have been no question; the instruments being part of one another, and to be taken together (*c*)."
In *Hayes v. Foorde*, a person devised, in remainder, "to the heirs male of my brother, *Nicholas*

(*a*) 2 Bl. C. 500.

(*c*) 1 Ves. 187.

(*b*) Cro. Eliz. 721.

Foorde's sons." At the same time, and with the same solemnities and attestation, the testator published a schedule referred to in his will (and which a special verdict in the case found to be a part of the will), containing an account of all his real and personal estate, in the words: "An account how I dispose of my estate to, &c. [the first devisees in the will] and for want of his [testator's brother, *William Foorde*] having sons, to my brother *Nicholas Foorde's sons.*" It became a question, whether *Nicholas*, the nephew, took an estate for life or in tail under the will and schedule. "The only doubt," it was said by the Justices of the King's Bench, "was, whether, by the words of the will, *Nicholas*, the nephew of the testator, took any estate by implication. That this doubt was removed by the schedule, which expressly gives an estate to the sons of his brother, *Nicholas Foorde*. That, therefore, *Nicholas*, the nephew, took an estate for life by implication, thus explained; which being conjoined with the estate expressly given to his heirs male, will, by the known rule of law, give him an estate in tail-male (a)."

A codicil, legally signed and witnessed to devise lands of inheritance, although land is not devised by it, but only legacies bequeathed (b), and it should seem also, although no mention is made in it of the will, does, of itself, republish the will (c), unless it appears to be the intention of the testator not to republish it (d). A codicil, which republishes a will, new dates it, and makes it a will of the day the codicil is made. The will, afterwards, speaks from the day of the new date. If the codicil varies the intention in

(a) 2 Bl. R. 698.

(b) *Pigott v. Waller*. 7 Ves. 98.

(c) *Acherly v. Vernon*, Com. R. 381. *Doe v. Davy*, Cowp. 158.

Barnes v. Crowe, 1 Ves. jun. 486. *Pigott v. Waller*, 7 Ves. 98.

Goodtitle v. Meredith, 2 M. &

S. 5. *Hulme v. Heygate*, 1

Mer. 285. *Rowley v. Eyton*, 2 Mer. 128.

(d) *Lady Strathmore v. Bowes*, 7 T. R. 482. 2 Bos. & P. 500.

the will, it, as a context, explains the intention. But if the codicil simply republishes the will, it leaves the intention to be discovered from the words of the will alone, as if the will were originally made on the day of the new date. Circumstances, which have intervened between the dates of the will and codicil, are not permitted to introduce an intention on the words of the will, which is not expressed by those words. Land, for instance, which the testator has purchased between the two dates, will pass under the republished will, provided (but in this case alone) there are words in the will sufficient to pass them, supposing the will originally made on the day of the date of the codicil. "Where a man," Lord *Mansfield* has said, "republishes his will, the effect is, that the terms and words of the will should be construed, to speak with regard to the property he is seised of at the date of the republication, just the same as if he had had such additional property at the time of the making his will. Therefore, if one devises lands by the names of *B. C.* and *D.*, and purchases new lands, and republishes his will, the republication does not concern such new lands, because the will speaks only of the particular lands, *B. C.* and *D.* But if the testator in his will says, I give *all* my real estate, a republication will affect such newly purchased lands, because it is then the same as if the testator had made a new will (*a*). To the same effect are the words of Lord *Ellenborough*, in *Goodtitle v. Meredith*: "As to the other question, what the effect of the codicil is, that has been settled in a series of cases, beginning with *Acherly v. Vernon* down to *Barnes v. Crowe*, and, lastly, in the more recent case of *Pigott v. Waller*. The effect of all these decisions is, to give an operation to the codicil *per se*, and independently of any intention, so as to bring down the will to the date of the codicil, making the will speak as of that date, unless, indeed, a contrary

(*a*) Cowp. 132. See also 7 T. R. 487.

intention be shewn, in which case it will repel that effect. Such was the case of *Bowes v. Bowes*, where the codicil devised the *said* lands ; which word *said* was considered by the judges as controlling the effect and operation of the codicil, confining it to those lands which would have passed under the will as it originally stood, and not extending the will to all the lands at the date of the codicil. Subject only to this restriction, arising out of the intention implied from the use of the word *said*, that there the testator does not mean to pass the whole, the general effect of a codicil is, to make the will speak as of its own date (a).” And, in the same case, it was said by Mr. Justice Bayley : “ It is an established rule, that a codicil, executed to pass real estate, is *primâ facie* a republication of the will, so as to pass after purchased lands. The rule is so, where the codicil relates to personal estate only, and therefore more especially when it relates to the passing of real estate ; but, taking it as a general proposition, it may be stated *primâ facie* to amount to a republication of the will (b).” In the late case of *Rowley v. Eyton*, a person by his will directed his debts to be paid, in the words : “ I order and direct that all my just debts and funeral expenses shall be in the first place paid and discharged, and with the payment thereof, I charge all my real and personal estate.” The testator, after making his will, purchased several copyhold estates, which he surrendered “ to such uses as he should by will, or any codicil thereto, appoint ;” and he subsequently made a codicil to his will, executed to pass real estates, and devised the newly purchased copyholds to his son, *Thomas Eyton*. On a creditor’s bill filed against the son, the codicil was held to be a republication of the will, and, in consequence, the after purchased estates decreed to be subject to the devise in the will for the payment of debts (c).

(a) 2 M. & S. 13.

(c) 2 Mer. 128.

(b) *Ibid*, 16.

CHAPTER XVIII.

OF EXPOSITION ON INTENTION, AND THE INFLUENCE OF AUTHORITY ON CONSTRUCTION.

A GREAT proportion of the cases which have been mentioned appear fully to authorise the general position, with which the present treatise is begun—that the intention of the testator is the law of devises. It cannot, however, be stated more than generally, that the construction of devises is governed by intention; the instances are numerous which prove the position not to be universally true. Frequently the object of a devise is legal, the intention is manifest, and yet the particular intention, it is considered by the courts, cannot be carried into effect. The chief impediment to the fulfilment of intention appears to be *authority*. A great part of the common law consists of adjudged cases, considered by the courts to be precedents, or authorities, they are bound to follow in every new case of a similar nature which comes before them (*a*). Wills appear to be not more independent of authority than any other subject of litigation. There is, indeed, often an appearance of profession in the courts, to decide, in cases on wills, on the intention alone. Thus, it has been said by the Lord Keeper *Northington*: “Every case upon wills stands upon its own circumstances, and former determinations are only of use to find out general principles to guide the judgment of the Court in the construction of the will before them” (*b*): and by Mr. Justice *Wilmut*; “All cases which depend on the intention of the testator (which is the pole-star for the direction of devises) are best determined upon comparing all the parts of the devise itself, without looking into a multitude of other cases; for each stands

(*a*) 1 Bl. C. 69. 5 T.R. 561. (*b*) 1 Eden, 95.
8 T.R. 68. 2 Bro. C. C. 86.

pretty much upon its own circumstances; and one is no rule for another, or very seldom at least (a):” and, in a late case, by Mr. Justice *Burrough*: “In questions concerning the intentions of a testator, I profess to decide on the will itself, and not on cases cited” (b). It cannot, however, be doubted, that it would be a mistake to understand either of these learned judges to intend to profess, in the expressions used, to decide universally on wills independently of authority. There is reason to believe they intended to be understood simply to say, that a will is to be construed on the intention, independently of authority, unless an authority, become law (c), compels the Court to adopt the particular construction put on a similar devise in a former will. In cases on wills, the courts first examine the words of the particular will to discover the intention; next, the legality of the intention is considered; the intention being legal, the Court then carefully deliberates on the way in which it may be best fulfilled (d); and, lastly, it is inquired if authority, become law, forces on the Court the particular interpretation put on a similar will in a former case. It is the language of Lord *Kenyon*; “It is our duty in construing a will to give effect to the devisor’s intention, as far as we can consistently with the rules of law; not conjecturing, but expounding his will from the words used. Where certain words have obtained a precise technical meaning, we ought not to give them a different meaning; that would be, as Lord *King* and other judges have said, removing land marks; but if there be no such appropriate meaning to the words used in a will, if the devisor’s intention be clear, and the words used be sufficient to give effect to it, we ought to construe those words so as to give effect to the intent, and not to doubt an account of other cases which tend only to involve the question in obscu-

(a) 2 Burr. 1112.

(c) See 1 Bl. C. 69.

(b) 3 Brod. & Bing. 91.

(d) 7 T. R. 325, 2 Ves. 247.

ity”(a). The courts, in cases on wills, often lament the force of authorities which they have not power to resist (b). The chief instances in which, by reason of precedents, the intention of the testator has, by universal acknowledgment, been probably frustrated, appear to be the cases of devises without words of inheritance (c); and the numerous dependents on *Robinson v. Robinson* (d).

Lord *Kenyon* appears to have subscribed to the opinion, that it had been wise in the law originally to have required in a will the technical language of a deed (e): “It has frequently been lamented,” observed his Lordship in a case before him, “that at first, after the passing of the Statute of Wills, the courts did not require the same technical expressions in a will to pass a real estate, as are necessary in the conveying of an estate by deed; for then we should not have had more cases on the construction of wills than of deeds; and it very rarely happens now that a question arises on the construction of a limitation in a deed. There are certain received words that are well known, and have from time to time been used by conveyancers in drawing deeds; and these exclude all doubt as to their legal meaning: but in expounding wills a greater latitude of construction has been allowed. After an anxious endeavour to discover the intention of a testator, it frequently happens that we can only conjecture what his intention was; and sometimes there is scarcely enough to form even a conjecture. Formerly, Sir *John Bland* made his own will; and, at the close of it, he said, that he had disposed of his estate in so clear a manner, that he thought it impossible for any lawyer to doubt about it. This will was afterwards contested, and it came before Lord *Hardwicke*, who said, that he was so utterly at a loss to conceive what was

(a) 6 T. R. 352.

(b) See 6 T. R. 353.

(c) See chap. xv, sec. xiv. p. 176.

(d) 1 Burr. 38. See chap. xiii, p. 100.

(e) See 8 T. R. 67, 502.

the real intention of the testator, that he wished he could find some ground on which to form a conjecture" (a). It may, indeed, be true, that much less litigation would be occasioned by wills if the law had originally required technical language to be used in them; but it is evident that the desired peaceful certainty of interpretation could not have been obtained, without the sacrifice of the important liberty, which every one at present enjoys, to make his own will. And notwithstanding the lamented liberty of testamentary disposition, it is probable that, of the number of wills daily opened, the proportion is very small which come before the courts.

It is a popular complaint, that wills are hard to be understood; that often, without legal advice, they are unintelligible, and, with it, are of doubtful construction. Wills, it is true, are sometimes void, because it is impossible to collect the meaning of them; (b) but it cannot, with reason, be said to be the fault of the law, that wills are of difficult interpretation; or, if it is, it must be considered to be the fault of the indulgence, which permits the almost endless varieties of settlement by will, nor requires technical language or form to their efficacy. If persons, in the exercise of the valuable privilege to make their own wills, fail to make themselves understood; if, which often happens, with a limited knowledge of the law, they unskilfully use technical speech, or, with technical, mix popular language; plainly the fault rests with themselves, that the meaning of the will is obscure, and the exposition of it; consequently, difficult.

(a) 8 T. R. 502.

Mohun v. Mohun, 1 Swanst. 201.

(b) Bowman v. Milbanke, 1 Lev.

Mason v. Robinson, 2 Sim. & St.

130. Doe v. Joinville, 3 East, 172.

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THE END.

ON the admission of collateral evidence to explain intention, the subject of Chapter III., the reader is referred to the judgment of Sir *Thomas Plumer*, in *Colpoys v. Colpoys*, Jacob, 451, published since that chapter was printed.

The author has, in the chapter mentioned, proposed the distinction :—if the words of a will fail to disclose an intention, collateral evidence is inadmissible to *discover* it ; but if an intention is discovered, collateral evidence is admissible to *explain* it (a). The judgment referred to of Sir *Thomas Plumer* is clearly an additional authority in favour of the latter position ; and it is apprehended His Honour did not intend to be understood to say farther, that if the words of a will fail to disclose an intention, collateral evidence is admissible to *discover* it. His words are these :—
 “ I would add, that I hope it will not be supposed that I agree to the opinion, that parol evidence is never to be let in, except in cases where there is a latent ambiguity. The admission of extrinsic circumstances to govern the construction of a written instrument is, in all cases, an exception to the general rule of law, which excludes every thing *dehors* the instrument. It is only from necessity, and then with great jealousy and caution, that courts, either of law or equity, will suffer this rule to be departed from. It must be the case of an ambiguity, which cannot otherwise be removed, and which may by these means be clearly and satisfactorily explained. This is always permitted in the

(a) p. 32.

case of a latent ambiguity, which not appearing on the face of the instrument, but arising entirely from extrinsic circumstances, may always be removed by a reference to extrinsic circumstances.

“ In the case of a patent ambiguity, that is, one appearing on the face of the instrument ; as a general rule, a reference to matter *dehors* the instrument is forbidden. It must, if possible, be removed by construction, and not by averment. But in many cases this is impracticable ; where the terms used are wholly indefinite and equivocal, and carry on the face of them no certain or explicit meaning, and the instrument furnishes no materials by which the ambiguity thus arising can be removed : if, in such cases, the Court were to reject the only mode by which the meaning could be ascertained, namely, the resort to extrinsic circumstances, the instrument must become inoperative and void. As a minor evil, therefore, common sense, and the law of England (which are seldom at variance), warrant the departure from the general rule, and call in the light of extrinsic evidence. The books are full of instances, sanctioned by the highest authorities, both in law and equity. When the person or the thing is designated, on the face of the instrument, by terms imperfect and equivocal, admitting either of no meaning at all by themselves, or of a variety of different meanings, referring tacitly or expressly for the ascertainment and completion of the meaning to extrinsic circumstances, it has never been considered an objection to the reception of the evidence of those circumstances, that the ambiguity was patent, manifested on the face of the instrument. When a legacy is given to a man by his surname, and the Christian name is not mentioned ; is not that a patent ambiguity ? Yet, it is decided that evidence is admissible. (*Price v. Page*, 4 Ves. 680). So, where there is a gift of the testator’s stock, that is ambiguous ; it has different

meanings when used by a farmer and a merchant. So with a bequest of jewels; if by a nobleman, it would pass all; but if by a jeweller, it would not pass those that he had in his shop. Thus, the same expression may vary in meaning according to the circumstances of the testator.

"To shew how mistaken the idea is, that extrinsic evidence is never to be received in cases of patent ambiguity, we may refer to a case in the House of Lords, unquestionably of that description, where the evidence was admitted. I mean the case of *Doe dem. Jersey v. Smith*. Mr. Justice *Bayley* thus states the principle on which it was introduced: 'The evidence here is not to produce a construction against the direct and natural meaning of the words; not to control a provision which was distinct and accurately described; but because there is an ambiguity on the face of the instrument; because an indefinite expression is used, capable of being satisfied in more ways than one; and I look to the state of the property at the time, to the estate and interest the settlor had, and the situation in which she stood with regard to the property she was settling, to see whether that estate, or interest, or situation, would assist us in judging what was her meaning by that indefinite expression' (a).

"If it were necessary, I could refer to many other instances of resorting to extrinsic matter in cases of patent ambiguity." (Jacob, 463—465).

THE two following cases have lately been determined in the Vice Chancellor's Court, on devises to charitable uses, the subject of Chapter II., Sec. IX.

In *Henchman v. The Attorney General*, a person devised certain copyhold lands to *W. H.* in fee; on condition that he, within one month after the decease of the testator, paid

(a) 2 Brod. & B. 553.

to his executors 2000*l.*, which he desired to be taken as part of his personal estate, and disposed of in the same manner. And, after giving certain legacies, he disposed of the residue of his personal estate, including the 2000*l.*, in favour of charities. The testator died without any customary heir, or next of kin. Held, that the devisee took the land subject to the payment of the 2000*l.*, to which the crown, and not the lord of the manor, was entitled. (2 Sim. & St. 498).

In *The Trustees of the British Museum v. White*, a person devised a freehold estate to trustees, in trust to sell it, and pay the proceeds to the Trustees of the *British Museum*, to be by them employed for the benefit of that Institution. The devise was held to be void under the statute of Geo. II. "I consider," said the Vice Chancellor, "that every gift for a public purpose, whether local or general, is within the 9 Geo. II., although not a charitable use within the common and narrow sense of those words." (*Ibid*, 594).

Oxenforth v. Cawkwell appears to be a farther authority for the position, stated in page 133, that if land devised is in part correctly, and in part incorrectly described, the exposition of the will is made simply on the correct description, and the misdescription remains ineffective. A testator, who was seised of copyholds, part of which he had surrendered to the use of his will, the other part of which he had not so surrendered, devised: "And as to all and every of my freehold, copyhold, and leasehold messuages, lands, tenements, and hereditaments, whatsoever and wheresoever situate, not hereinbefore given, devised, or bequeathed, the copyhold parts thereof having been duly surrendered to the uses of this my will, I give, devise, and bequeath the same to," &c. Held, that the unsundered, as well as the surrendered, copyholds passed by the devise. (*Ibid*, 558).

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